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In the
Supreme Court of the United States

October Term, 1970

No. 1295

WILLIAM R. BALLOU, ET AL.,
PETITIONERS,

v.

GENERAL ELECTRIC COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Plaintiffs-Petitioners (hereinafter "Apprentices") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The Order of the Court of Appeals denying the Apprentices' Petition for Rehearing is unreported, but is set forth at Appendix A of this Petition. The Opinion of the Court of Appeals for the First Circuit affirming the District Court's Judgment for Respondent General Electric Company is reported at 423 F.2d. 96 (No. 7002, 1st Cir. 1970)

19 WH 739 and 64 CCH LC ¶32,401 and is annexed as Appendix B. The Opinion of the District Court for the District of Massachusetts granting Judgment to the Respondent is reported at 310 Fed. Supp. 476, (D. Mass. 1970) 19 WH 440 and 62 CCH LC ¶32,336 and is set forth as Appendix C.

The Opinion of the Court of Appeals reversing the District Court's initial Dismissal of the Apprentices' Complaint is reported at 393 F.2d. 398 (1st. Cir. 1968) 18 WH 399 and 57 CCH LC ¶32,037 and is set out as Appendix D. The Memorandum and Order of the District Court, Civil Action No. 67-223-C, June 22, 1967, initially dismissing the Apprentices' Complaint is not reported but is set forth as Appendix E.

Jurisdiction Of This Court

The Judgment of the Court of Appeals was entered on October 16, 1970. The Order of the Court of Appeals denying the Apprentices' Petition for Rehearing was entered on November 5, 1970.

This Court has jurisdiction to review the Judgment of the United States Court of Appeals pursuant to Title 28, United States code, section 1254(1), 28 U.S.C. section 1254(1).

Questions Presented

I). Do the Portal-to-Portal Act, 29 U.S.C., sections 251, et seq. and *Walling* v. *Portland Terminal Company*, 330 U.S. 148 (1947) and *Walling* v. *Nashville, Chattanooga & St. Louis Railway*, 330 U.S. 158 (1947) necessarily exclude time spent by Apprentices, in required classroom and home study work while employed by Respondent in its Lynn River Works Apprenticeship Training Program, as time worked for the purposes of sections 6 and 7 of the

Fair Labor Standards Act, 29 U.S.C. sections 206 and 207.

II). Did the Court of Appeals err in concluding that there was no substantial issue of material fact on the issue of whether the Regulations of the United States Department of Labor relieved Respondent from payment of compensation for time spent by Apprentices in required classroom attendance, and in required classroom and home study work as Apprentices employed by Respondent?

Relevant Statutes and Regulations

The statutes involved are sections 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. sections 206 and 207, and section 4(a) of the Portal-to-Portal Act, 29 U.S.C. section 254(a).

The Regulations of the United States Department of Labor involved are sections 785.27 through 785.32. Title 29, Part 785 of the Code of Federal Regulations, 29 C.F.R. sections 785.27 through 785.32.

The statutes and regulations are annexed at Appendix F.

Statement Of The Case

On March 10, 1967, approximately 106 Apprentices, on behalf of themselves and all other persons similarly situated, filed a Complaint in the United States District Court for the District of Massachusetts seeking payment of minimum and overtime compensation for time spent in required classroom and home study work as Apprentices employed by Respondent at its Lynn, Massachusetts, River Works plant. The District Court had original jurisdiction on the basis of 28 U.S.C. section 1337 and 29 U.S.C., section 216(b).

The District Court dismissed the Petitioners' Com-

plaint. The United States Court of Appeals reversed the District Court's dismissal and remanded, *Ballou* v. *General Electric Company*, 393 F.2d. 398 (1st. Cir. 1968). On remand, Interrogatories were filed and partially answered. The Respondent moved for Summary Judgment and the parties filed Affidavits. The District Court granted the Motion for Summary Judgment ruling that the Petitioners' classroom and home study work were postliminary, 310 Fed.Supp. 476 (D.Mass. 1970). The Court of Appeals affirmed the District Court's judgment, 423 F.2d. 96 (1st. Cir. October 16, 1970), 19 WH 739. The Court of Appeals denied the Apprentices' Petition for Rehearing on November 5, 1970.

Each Apprentice was required in his employment by Respondent to engage in two kinds of activity: (1) shop work training which was normally scheduled for forty hours each week and (2) related classroom and home study work at times outside of the periods of scheduled shop work.[1] While Respondent paid Apprentices for the time they engaged in shop work training, it paid them nothing for time spent in required attendance at classroom lectures and nothing for time spent in required preparation at home of classroom assignments.

Each Apprentice as an applicant for the River Works Apprenticeship Training Program was required to undergo written examinations intended to test an applicant's ability to perform the classroom and home study work.

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[1] The number of hours of required attendance at classroom lectures scheduled for each Apprentice varied according to the craft subprogram in which a Petitioner was enrolled. The total number of hours of related classroom instruction range from a minimum scheduled 524 hours to a maximum scheduled 700 or more hours (there are also incidental variances in the schedules of certain Apprentices. No Apprentice was scheduled for less than 510 classroom hours.) Each Apprentice, regardless of his craft program, spent the first 2000 hours of his shop work in relatively unskilled Bench work.

The examination results were given substantial weight in the Respondent's decision to employ an applicant as an Apprentice.

During his employment, each Apprentice executed an Apprentice Agreement which provided in part:

> "The Apprentice agrees to perform willingly such work in the shop or office as in the judgment of the Company will prepare him efficiently for his future career. He also agrees to regularly attend classes covering the prescribed educational work and to do the accompanying home study.
>
> • • •
>
> "The purpose of the Company's Apprentice Program is to train the Apprentice in technical skills and functions. . . The Company agrees that it will cause to be carefully and skillfully taught to the Apprentice techniques in one or more of the said subjects and that upon the completion of the full term of Apprenticeship, a certificate of apprenticeship as evidence of the prescribed training, including the scheduled academic training, will be issued to the Apprentice.
>
> "The Company agrees that, after the Apprentice shall have served the full term of apprenticeship, including the making up of lost time and the satisfactory completion of the prescribed educational work, it will pay the Apprentice, at the termination of the said Apprenticeship, in consideration of such faithful service, the sum of 100 dollars.
>
> • • •
>
> "The Company may terminate or extend the Program if the Apprentice demonstrates unsatisfactory progress on the job or in academic performance."

Respondent required Petitioners to execute the Agreements or be removed from their employment in January and February, 1967. Many Petitioners executed the Agreements under protest. And Local 201, International Union Electrical, Radio and Machine Workers Union, AFL-CIO, the collective bargaining representative of the Apprentices, objected to the Company's action in requiring the Apprentices to execute Agreements.

During their employment each Apprentice was regularly graded in (1) shop work training, (2) home study performance (where home work assignments were performed in writing which the Apprentices had to return for marking by instructors), and (3) tests taken during classes which related to subjects covered in previous class periods and/or earlier home work assignments.

Each Apprentice received a course grade in each subject of the classroom and home study work at the conclusion of a customary semester. (The annual classwork schedules paralleled the common academic year of two semesters). Tests based on text book and class lecture content counted for sixty percent; and home work assignments, classroom attendance, and classroom participation counted for forty percent towards that course grade. If an Apprentice received two or more failing course grades at the conclusion of a semester or two consecutive failing course grades in a continuing subject, he was removed as an Apprentice. Each Petitioner was required to meet a minimum cumulative course grade average at the end of each semester (the minimum cumulative course grade average increased over successive semesters). If a Petitioner failed to meet his minimum class and home study cumulative grade average, he would be terminated from his employment or placed upon probation (if his shop performance rating also met a minimum shop work rating) with the obligation to meet the next semester's higher minimum

classwork cumulative grade average, and to maintain or improve his shopwork rating.

Fifteen of the original Petitioners were terminated by the Respondent from their Apprentice employment because of their failure to meet the standards of performance in class and home study work. At least one of the fifteen was also terminated because of his assertedly poor classroom attendance record.

The related classroom curriculum, which Respondent obligated Apprentices to satisfactorily complete, covered matters directly applicable to journeyman's shop work activity and matters intended to educate the Apprentice in aspects of other higher rated work. Within General Electric Company, graduation from the Lynn River Works Program is considered a strong mark of the graduate's ability and training. Most graduates ultimately become foremen, supervisors or higher level technicians. Many may rise to higher management positions: two graduates have become managers of the River Works plant and one has become a General Electric Corporate Vice-President.

A syllabus of the required classroom curriculum for each craft sub-program is annexed as Appendix G.

Apprentices are represented by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter "IUE") and Local 201 thereof, in a production and maintenance unit at the River Works. The IUE and Local 201 were at all times parties to a nationally negotiated collective bargaining agreement with the Respondent. That collective bargaining agreement left certain matters to be negotiated between the Respondent and individual IUE Local Unions which represented employees of the Respondent. Respondent informed the IUE, after the execution of the national collective bargaining agreement in effect at the time of the commencement of this

action, that Apprentice Training was properly the subject of discussion between IUE Locals and local plant managements of the Respondent. Local 201 has never been a party to any Joint Apprenticeship Committee. Local 201 has never agreed to the River Works Apprenticeship Program or the Apprentiqeship Agreements in any way and it has never waived any right or interest to participate in the administration of Apprentice Training Programs at the Lynn River Works plant.

Local 201, in connection with its objection to the Respondent's action of requiring each Apprentice to execute an apprenticeship agreement, proposed: (1) The Apprenticeship Agreement should be an Agreement between the Respondent and Local 201; (2) Class time should be paid; (3) Apprentices should have recall and lack of work guarantees; (4) Any Apprenticeship Agreement should be subordinated to the National G.E.-IUE Agreement; (5) Apprentices should be guaranteed training assignments, and not assigned to production work; (6) Course and work assignments should be more specific. The Respondent did not accept any of these changes.

On earlier occasions, Local 201 has filed grievances on behalf of production workers who had been laid off because of lack of work while apprentices continued to perform work, at lower rates, which the laid off production workers would otherwise perform.

The River Works Apprenticeship Training Program has never been registered and approved by the United States Bureau of Apprenticeship Training or by the Massachusetts Division of Apprentice Training. However, on June 21, 1968, the Respondent obtained approval of its River Works Apprenticeship Training Program from the Massachusetts Division of Apprentice Training.

Argument

I. The Classroom And Home Study Work Of The Apprentices Was Either (a) A Principal Activity Of The Apprentices As Employees And/Or (b) Integral And Indispensable To The Principal Activity Of Apprentices Employed By The Respondent.

I (a) *The Apprentices' Classroom And Home Study Work Is A Principal Activity Of Their Employment As Respondent's Apprentices. Hence Time Spent By The Apprentices In Classroom And Home Study Work Is Subject To Section 6 And 7, Fair Labor Standards Act.*

In the instant case each apprentice was employed under the following written terms:

> "The Apprentice agrees to perform willingly such work in the shop or office as in the judgment of the Company will prepare him efficiently for his future career. He also agrees to regularly attend classes covering the prescribed educational work and to do the accompanying home study."

The written agreement makes it clear that the intent of employing Petitioners was to train them in certain skills by (1) shop work activity and (2) class and home study activity. The Court of Appeals recognines the dual activities for which Petitioners were employed, at pages 3 and 4 of its Opinion:

> "The apprentices were hired both to work and to engage in training so that they could become more useful employees. If an apprentice failed in either his

> capacity as worker or trainee, he would be fired. Even though it is undisputed that G.E. could have carried on its training program without classroom activity, it did not choose to do so. Classroom training seems to be an essential part of the training program G.E. has decided to set up and is to be distinguished from activities allowed for the employees' convenience, such as the post-work showers in *Mitchell* v. *Southeastern Carbon Paper Co.*, 228 F.2d. 934 (5th Cir. 1955)."

Since, as the Court of Appeals finds, Petitioners were hired to perform class and home study work, the time spent in such activity is time spent in a principal activity and is compensable. Certainly the class and home study activity time, in the instant case, required by Respondent, and in which minimum performance levels were insisted upon by Respondent, was time ". . . during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and time spent in "mental exertion . . . controlled and required by the Respondent". *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944).[2] Hence that time was devoted to a principal activity subject to the minimum wage and overtime provisions of the Fair Labor Standards Act, sections 6 and 7.

Walling v. *Portland Terminal Co.*, 330 U.S. 148 (1947) and *Walling* v. *Nashville, Chattanooga & St. Louis Railway*, 330 U.S. 158 (1947) do not require a decision that the classroom and home study activities of these Appren-

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[2] The Portal-to-Portal Act did not change these interpretations by the Court of the Fair Labor Standards Act except to provide an exception for preliminary and postliminary activities. *Miller* v. *Howe Sound Mining Co.*, 77 F. Supp. 540 (E.D. Wash. 1948), *cf.* 29 C.F.R. 785.7.

tices are excluded from the coverage of the Fair Labor Standards Act, sections 6 and 7, 29 U.S.C. sections 206 and 207. In the *Walling* cases, *supra*, no employment relationship existed during the periods for which compensation was being claimed. The Apprentices here involved were employees during their performance of (a) shop work training and (b) during classroom and home study work, and were subject to discharge from Respondent's employment for unsatisfactory performance of either type of work.

I (b) ***The Classroom And Home Study Work Of The Apprentices Is Integral And Indispensable To The Principal Activity Of Apprentices Employed By The Respondent. Therefore, The Respondent Is Not Relieved From Its Statutory Duty To Pay Compensation By Section 4(a) Of The Portal-To-Portal Act, 29 U.S.C. Section 254 (a).***

This Court holds that activities are not "preliminary or postliminary" within section 4(a) of the Portal-to-Portal Act if the activities are "an integral and indispensable part of the principal activities for which covered workers are employed. . ." *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) at 256, and *Mitchell* v. *King Packing Company*, 350 U.S. 260 (1956).

These Apprentices were employed to learn a trade which Respondent would teach to them through shop work training and classroom and home study programs. Continued employment depended on their meeting the class attendance requirements and achieving the minimum classroom performance standards enforced by the Respondent. Their ability to undertake the classroom training, reflected by the results of pre-hire examinations, was a substantial fac-

ter in Respondent's decision to employ these Apprentices. Fifteen Apprentices were terminated because they did not meet the required attendance schedules and/or failed to achieve the minimum classroom performance standards.

The classroom and home study work is integral and indispensable to the Apprentice Training Program which the Respondent has established. The Court of Appeals recognizes, at page 3 of its Opinion:

> "Classroom training seems to be an essential part of the training program G.E. has decided to set up."

If shop training is the principal activity of the Apprentice Training Program, classroom training is an essential part of that program.

Classroom attendance and class and home study work were required of Apprentices in order for them to maintain their employment. Hence, the classroom and home study work was indispensable to a continuance of the employment relationship. Furthermore, the Apprentices' employment depended on their achieving performance standards established by the Respondent in their classroom and home study work. The classroom and home study work, directed and controlled by the Respondent, through which theoretical and practical knowledge of shop work was developed, were integral and indispensable to an Apprentice's employment. And since the Apprentice classroom and home study work meets the tests established in *Steiner, supra*, and *King Packing Co., supra*, it must be compensated pursuant to sections 6 and 7 of the Fair Labor Standards Act.

The regulations of the Department of Labor confirm that classroom training is integral and indispensable. The reg-

lations of the Wage and Hour Administrator on Apprenticeship Training state, at 29 C.F.R., 521.2(a):

> "Apprentice means a worker . . . who is employed to learn a skilled trade . . . in conformity with or in substantial conformity with the standards of Apprenticeship set forth in section 521.3."

Section 521.3, 29 C.F.R. section 521.3, includes as standards:

> "(a) employment and training of the apprentice in a skilled trade . . .
> "(b) two or more years (4000 or more hours) of work experience . . .
> "(i) related instruction if available."

This regulation supports the Apprentices' contention in two ways. First, the definition of "Apprentice" in 29 C.F.R. section 521.2(a) is co-extensive with the purposes stated in the Apprentices' employment agreements. Since the standards to which the definition set out in section 521.2(a) refers require that classroom instruction be provided if available, classroom instruction is an essential, necessary and fundamental feature of Apprenticeship employment as defined in the Regulations. Thus, the regulations show such classroom work meets this Court's *Steiner* and *Mitchell* tests. The regulations also support the initial argument that classroom training activity is itself a principal activity of an apprentice as defined. The Respondent's Apprentice Training Program conforms to that part of the foregoing standards which deals with providing related instruction.

The fundamental standards of the Bureau of Apprenticeship and Training, recognize that classroom training and

study is a principal activity of Apprentices, see Appendix H. The fifth minimum standard of the Bureau is:

> "Organized instruction designed to provide the apprentice with knowledge in technical subjects related to his trade (a minimum of 144 hours per year is normally considered necessary)."

The Bureau confirms in its explanatory publications that related classroom instruction is a principal activity of modern apprentices and/or that such classroom work is integral and indispensable to present apprentice employment. *Setting Up An Apprenticeship Program*, U.S. Department of Labor, Bureau of Apprenticeship and Training, 1966, states on page 9:

> "As apprenticeship is most suited to jobs requiring broad skills and knowledge learned best on the job, apprentices will need classroom instruction".

The National Apprenticeship Program, U. S. Department of Labor, Bureau of Apprenticeship and Training, 1968 Edition,[3] states at page 7:

> "Apprenticeship programs combine on-the-job training and work experience with related instruction in the theoretical aspects of a trade.
>
> "The on-the-job training and work experience of the machinist apprentice, for example, is usually supplemented by related instruction in trade theory, blueprint reading, mechanical drawing, safe working practices, trade mathematics, physics, and other subjects related to the job."

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[3] Both explanatory publications are included in the Record Appendix in the Court of Appeals as R.A. Items 24(a) and 24(b).

Yet the Court of Appeals, making an imprecise coupling of the "spirit" of both the Portal-to-Portal Act and the Fair Labor Standards Act, holds that the only compensable activity of the apprentices is shop work training. This exclusion of class time during which the Petitioners were under the control of the Respondent and engaged in activities required to maintain their employment is substantially no diffrent than the attempted exclusion of sleeping time in *General Electric* v. *Porter*, 208 F.2d. 805 (9th. Cir. 1953). In *Porter, supra*, the Court of Appeals held that sleeping time of firemen was compensable under the Act on the basis that they were employed to wait and required to remain at a work site under the employer's control and direction.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THERE WAS NO SUBSTANTIAL ISSUE OF MATERIAL FACT AS TO WHETHER THE REGULATIONS OF THE UNITED STATES DEPARTMENT OF LABOR RELIEVED RESPONDENT FROM PAYMENT OF COMPENSATION FOR TIME SPENT BY APPRENTICES IN REQUIRED CLASSROOM ATTENDANCE, AND IN REQUIRED CLASSROOM AND HOME STUDY WORK.

The Court of Appeals erroneously concludes that there is no material issue of fact as to whether or not Respondant's Apprentice program complied with the criteria established in the Regulations of the United States Department of Labor, section 785.32, 29 C.F.R. section 785.32, Appendix F. The Court concedes that if the interpretation of that section urged by the Apprentices is correct, a material question of fact of Respondent's compliance exists. Section 785.32 states that time spent by Apprentices in classroom activity may be excluded if the Apprenticeship program substantially complies with the funda-

mental standards of the Bureau of Apprenticeship and Training. In reaching its conclusion the Court misconceives the relations between sections 785.27 through section 785.32, Appendix F, which establish the principles applied by the Administrator to class activity. These principles establish that apprentices' classroom time which is compensable by standards set out in Section 785.27 can be excluded from hours worked only by the operation of separate criteria contained in Section 785.32. Furthermore, the Court misinterprets the Bureau of Apprenticeship and Training's fundamental standard of "employee-employer cooperation" as that standard is applied to apprentices represented by a collective bargaining agent. Compliance with this standard thus requires the collective bargaining agent's participation and approval in the formation and the administration of the Apprenticeship program.

Section 785.27 of the Department's Regulations, 29 C.F.R. section 785.27, Appendix F, requires that classroom training must meet each of the following four criteria in order to be discounted as working time:

> "(a) attendance is outside the employees' regular working hours;
> "(b) attendance is in fact voluntary;
> "(c) the course, lecture or meeting is not directly related to the employee's job; and
> "(d) the employee does not perform any productive work during this period."

Section 785.28, 29 C.F.R. section 785.28, Appendix F, explains that attendance is not voluntary if (1) attendance is actually required or (2) the employee is induced to believe that non-attendance will affect the continuance of his employment. Section 785.29, 29 C.F.R. 785.29, Appendix

F, defines "directly related training" as training designed to make the employee handle his job more effectively as distinguished from teaching an employee new skills. In the present case, apprentices were required to take many courses directly related to the work they were performing, i.e., shop mathematics, blueprint reading and National Electric Code courses.

The dispositive regulation is section 785.32, 29 C.F.R. section 785.32 which states in part:[4]

> "As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship agreements may be excluded from working time if the following criteria are met:
> "(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and
> "(b) Such time does not involve productive work or performance of the apprentices regular duties. If the above criteria are met, the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked."

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[4] Section 785.32 also bears on the first issue: If the conditions of section 785.32 are not met, then the requirement that related classroom time must be compensated means that it is time spent in an activity compensable notwithstanding section 4(a), 29 U.S.C. section 254(a). To the extent that the Court of Appeals relies on section 785.32 to support its conclusion, its opinion is internally inconsistent.

Thus, if the time spent by Respondent's apprentices in classroom activity is hours worked by application of the standards of section 785.27 (a)(b)(c) and (d), 29 C.F.R. section 785.27 (a)(b)(c) and (d), Appendix F, that time can only be excluded from hours worked by the compliance of the Respondent's program with the separate and additional criteria established in section 785.32 (a) and (b), 29 C.F.R. section 785.32 (a) and (b).

The Petitioners assert that the Respondent's Lynn River Works, Apprenticeship Program does not meet the Bureau's fundamental standard of "Employee-Employer Cooperation"[5] as it is intended to apply to that program. *Setting Up An Apprenticeship Program supra* p. 14, states at page 5 a six-step course which an Employer must follow if apprentices are represented by a collective bargaining agent as Petitioners are represented by IUE Local 201. Included in the six steps are:

• • •

"2. Set up a joint apprenticeship committee with the Union to administer the program. The committee should have equal representation of labor and management, perhaps three from each.

• • •

"6. If the Union has no interest in the specific apprenticeship plan, the Company should obtain a waiver from the Union so that it can adopt the alternate course of action."

The same publication also states at page 10:

"Apprenticeship Agreement — Your program should provide for the signing of an agreement of apprenticeship between each apprentice and the proper officer of the establishment for registration purposes

[5] The fundamental standards are twelve in number and are set forth at appendix H.

> with the appropriate State or Federal apprenticeship agencies serving the area where the program is established .... If a Union is involved, its approval is necessary; or if a joint apprenticeship committee exists, the agreement would be approved by such a committee."

The National Apprenticeship Program, 1968 Edition, supra p. 14, makes the point, at page 5, "Joint Committees are created in plants having organized workers."

The Court of Appeals, however, disregards the Bureau's explanation of "Employee-Employer Cooperation" in organized plants such as the Lynn River Works operation. It is clear, however, that if the apprentices are represented by a bargaining agent, the Bureau considers that "Employee-Employer Cooperation" can exist only when the Employer and the Union have taken the steps of establishing a joint apprenticeship committee or explicitly waived the Union's interest in specific programs. And the Court of Appeals admits in footnotes 5 and 6 of its Opinion that there is conceivably a factual question as to Respondent's compliance with this interpretation.[6]

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[6] The interpretation urged by Petitioners is also supported by the agreement between the Bureau and the National Association of State and Territorial Directors executed on March 7, 1969, establishing minimum guidelines. That agreement provides as a minimum guideline as follows:

> "Provisions for employer-employee cooperation where a bargaining agreement exists. This may be demonstrated by one or more of the following:
> "appropriate provisions in the bargaining agreements . . .
> "signature to the standards . . ."
> "letter from each indicating agreement to the program . . .
> "establishment of a joint apprenticeship committee."

This Agreement is quoted in relevant part in Apprentice's affidavit and is included in the Record Appendix in the Court of Appeals as R. A. Item 25 only to the extent of the part of the agreement so quoted.

No joint apprenticeship committee has ever existed. Local 201 has never agreed to the Respondent's Apprentice Program at the River Works, and Local 201 has never explicitly waived its interest in the Program. Respondent has never accepted any of the proposals made by Local 201 IUE for changes. And Respondent has never solicited any recommendations from, or given any proposal to IUE Local 201 for any changes. Thus, if the interpretation of the Petitioners is correct, then the Respondent's Program does not comply with section 785.32. Since "Employee-Employer Cooperation" is a *fundamental* standard the Respondent must meet it as the Bureau intends that standard in plants at which Apprentices are represented.

Granting the Petitioners' contentions as to the application and meaning of this standard, the Court of Appeals erred in view of the factual question of Respondent's compliance. *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962).

Assume the opposed construction of "employee-employer cooperation" is correct, a material issue of fact regarding Respondent's compliance still exists. The apprentices protested the execution of the Agreements at issue in this case. And IUE Local 201 objected to basic features of the Respondent's apprentice programs as the programs were established and administered. Moreover IUE Local 201 protested the use of apprentices to perform non-training production work while journeyman were on lay off status and at rates of pay far less than the journeymens'. The disputes between the Apprentices and Respondent; and IUE Local 201 and Respondent regarding the Apprenticeship Program at the River Works demonstrate that a question of compliance with the requirement of "employee-employer cooperation" exists.

In any event the lack of registration and approval by the Bureau or an approved State Apprenticeship Agency

of the Respondent's Apprentice Training Program displaces the River Works Program from the enforcement policy stated in Section 785.32. Opinion Letter No. 487 of the Wage Hour Administrator, C.C.H. Wage-Hour Admn. Rulings, 1961-1966 ¶30.997.29 is set forth in Appendix I and states in part:

> "This replies to your letter of May 18, 1966, concerning the meaning for purposes of section 785.32 of Interpretative Bulletin, Part 785, of the requirements of "substantially conforming with" the standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor. You note that section 521.3 (e) of Regulations, Part 521, indicates that an apprenticeship program must be registered with the U.S. Department of Labor, and inquire, in effect, whether section 785.32 applies if the apprenticeship program has not been registered.
>
> "The Fair Labor Standards Act requires that covered employees be paid a minimum wage of not less than $1.25 an hour for all hours worked and overtime compensation at a rate of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. This requirement applies to apprentices as well as journeymen. However, section 785.32 provides that when an apprentice in a bona fide apprenticeship program spends time in receiving related, supplemental instruction, such as in a classroom where no productive work is performed, that time does not have to be counted as hours worked under certain circumstances. In order to qualify under this section, the apprenticeship program in which the apprentice is working must substantially meet the fundamental standards of the Bureau of Apprenticeship and Training. The WHPC Divisions will con-

> sider that a program complies with such standards if the program has been registered and approved by a State apprenticeship agency approved by the Bureau of Apprenticeship and Training or by the Bureau itself. If the program is not so registered, section 785.32 is inapplicable."

Without both approval and registration the Respondent, according to Opinion Letter No. 487 cannot rely on establishing its immunity by section 785.32 standards. And, the Respondent's relinnce on section 785.31 implies its own recognition that Respondent was unable to meet the registration requirement and/or the fundamental standards of the Bureau of Apprenticeship and Training.

In the present case, the Court gave considerable weight to an approval by the Wage-Hour Administrator,[7] based on 29 C.F.R. section 785.31, Appendix F. Section 785.31 states:

> "There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer."

Section 785.31's special situations involve the employee's voluntary attendance at classes relating to the employee's

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[7] The approval letter of the Wage and Hour Administrator, Opinion Letter 996, is reproduced at Appendix J. His Opinion Letter 272 which is also discussed herein is set forth at appendix K.

present job. This special situation of section 785.31 is the equivalent of 29 C.F.R. section 785.30 except that instruction is provided by the Employer, not an independent school, college or trade school. The integration of section 785.27 through 785.32 demonstrates that section 785.31, under which the Administrator purported to act, despite the requirement that Apprentices in Respondent's Apprentice Training Program attend classes, is actually an exemption from the criteria in section 785.27(c) that the course "... is not directly related to the employee's job ...". The incongruity of applying section 785.31 to this case is further shown by the fact that section 785.32 separately deals with the specific issue of compensation for an Apprentice's related classroom training.

Furthermore, the Approval Letter, of the Wage-Hour Administrator, Opinion Letter 996, is inconsistent with other Opinion Letters of the Wage-Hour Administrator. Opinion Letter 272, July 10, 1964, W.H.M. 93:306 provides in part:

> "This is in further reference to your letter ... regarding the application of the Fair Labor Standards Act to your firm's Employee Training Program which consists of a four-year work-study period.
>
> "The highlights of your program ... are as follows...:
>
> " • • •
>
> "(3) Trainees will work as other employees but will be given a comprehensive course of study and instruction.
>
> "(4) Trainees will be assigned courses of night study at selected educational institutions. Tuition and other fees and books will be paid for by the Company. No payment for hours of class, transportation or study will be made ...
>
> " • • •
>
> "As explained at Section 787.27, attendance at lec-

> tures, meetings training programs and similar activities need not be counted as working time if: ...b) attendance is in fact voluntary ... Based on these criteria it would appear that the time spent by your trainees in taking courses at night would be considered hours worked and therefore compensable under the Fair Labor Standards Act."

Opinion letters 996 and 272 are completely inconsistent in their treatment of required class time despite their remarkably parallel facts. In view of the illogical application of section 785.31 to the present case, and the inconsistency of Opinion Letters 996 and 272 on the treatment of required class time, Opinion Letter 996 should not have been given the deference the Court of Appeals gives to it. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, (1944) states at page 139:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reasons of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control".[8]

Conclusion

The Petition for Writ of Certiorari to the Court of Appeals for the First Circuit should be granted because that

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[8] Following this mandate, various courts have rejected certain of the Administrator's interpretations. E.g. *Mitchell* v. *Trade Winds Co.*, 289 F. 2d 278 (5th Cir. 1961); *McComb* v. *Consolidated Fisheries Co.*, 75 F. Supp. 798 (D.Del.1948) aff'd 174 F.2d 74 (3rd. Cir. 1949).

Court has decided an important question of federal law which should be decided by this Court. Moreover, the Court of Appeals' decision is inconsistent with principles established in other relevant decisions of this Court.

This Nation's increasingly complex and technologically expanding industrial society produces, as a frequent feature of employment, required classroom instruction and home study work controlled by, and based on curricula prescribed by employers. The questions presented by this Petition involve this development and should be determined for the benefit of employees and employers.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7602.

WILLIAM R. BALLOU ET AL.,
PLAINTIFFS, APPELLANTS,
v.
GENERAL ELECTRIC COMPANY,
DEFENDANT, APPELLEE.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

ORDER OF COURT

Entered November 5, 1970

We see no merit in appellants' petition for rehearing. Appellants' first two arguments are merely restatements of arguments we have already rejected. See Local Rule 9.

The third argument, while in essence reargument, is advanced in greater detail but to no more effect than before. We have reviewed the regulations and the opinion letter said to destroy the validity of Opinion Letter 996. Apart from the fact that our reliance on this Letter was secondary and cumulative, we are persuaded that our reliance was correct. Opinion Letter 996, ruling that the G.E. program was a "special situation", relates to 29 C.F.R. § 785.31, which has to do with "special situations" when training programs are not considered as working time even though all of the criteria of section 29 C.F.R. § 785.27 are not met. The allegedly earlier conflicting Opinion Letter, 272, is addressed to the latter regulation.

The petition is denied.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc. Messrs. McMahon and Fordham.]

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 7602.

WILLIAM R. BALLOU ET AL.,
PLAINTIFFS, APPELLANTS,
v.
GENERAL ELECTRIC COMPANY,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

John McMahon, with whom *Angoff, Goldman, Manning & Pyle* was on brief, for appellants.
Laurence S. Fordham, with whom *David W. Walker* and *Foley, Hoag & Eliot* were on brief, for appellee.

October 16, 1970.

COFFIN, *Circuit Judge*. Appellants are apprentices in a program run by appellee, General Electric Company. This program consists of on-the-job training conducted at appellee's plant in Lynn, Massachusetts, and additional classes conducted off appellee's premises by independent educational institutions. Although appellee pays the apprentices' tuition for this outside classwork, it pays them nothing for the time spent in class or preparing for class. Appellants are required by their employment contracts to prepare for, attend, and make satisfactory progress in these classes. An apprentice who fails to keep these conditions is subject to dismissal. For the most part, the classwork does not

relate directly to the skills apprentices receive in on-the-job training. Its approach is more theoretical, providing the apprentices with an academic understanding of the skills they are developing.

Appellants claim that the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* entitles them to compensation for the time spent in and preparing for class. They filed suit in the district court for back pay. The court dismissed their complaint as failing to state a cause of action. It held that the classroom activity was "preliminary or postliminary to . . . principal activity or activities", and thus was exempt from coverage of the Fair Labor Standards Act under the Portal-to-Portal Act, 29 U.S.C. § 254(a). Although we expressed some skepticism as to whether appellants were entitled to compensation for this classwork, we nevertheless reversed the district court's dismissal because the record was too barren for us to decide the issue. *Ballou* v. *General Electric Co.*, 393 F.2d 398 (1st Cir. 1968). On remand, interrogatories were filed and partially answered. Appellee moved for summary judgment and both sides filed affidavits. The court granted the motion, ruling that appellants' classroom activities were preliminary or postliminary to appellants' principal activity—work-training.

In so ruling, the court utilized the test set down by the Supreme Court in the companion cases of *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). The Court there held that activities are not "preliminary or postliminary" if they are "an integral and indispensable part of the principal activities for which covered workers are employed . . . ." 350 U.S. at 256. Appellants claim that the district court erred by ruling that the time apprentices spend preparing for an attending class was not an "integral and indispensable part" of their principal activity of employment.

Initially we are confronted with appellants' claim that

summary judgment is not an appropriate method for deciding this issue both because the issues are complex and because the records relating to the apprentice program are in G.E.'s control. Appellants do not say what they would find if they had access to appellee's records. All have participated in the apprentice program and have first-hand knowledge of its operations. They offer no reason why the discovery in which they engaged did not uncover the information supposedly contained in the records. Nor do they offer any reason why they could not have discovered these records if they had felt them so important.

Though it may be complex, the issue whether or not the classroom program was an "integral and indispensable part" of appellants' principal activity is not, as appellants suggest, a factual one. It is a question of law. In both *Steiner* and *King Packing*, *supra*, the Supreme Court determined whether the disputed activities were preliminary or postliminary; the issue was not one of factual inferences to be decided by a jury.[1]

Having determined that summary judgment was appropriate, we turn to the substantive question of compensability for classroom study. Appellants argue that a compulsory program must be an "integral and indispensable part" of their principal activity or else it would not be compulsory. At first glance, this contention seems to have some merit. The apprentices were hired both to work and to engage in training so that they could become more useful employees. If an apprentice failed in either his capacity as worker or trainee, he would be fired. Even though it is undisputed that G.E. could have carried on its training program without classroom activity, it did not choose to do so. Classroom training seems to be an essential part of the training program G.E. has decided

[1] *See also Wirtz* v. *Marino*, 405 F.2d 938 (1st Cir. 1968); *Mitchell* v. *Southeastern Carbon Paper Co.*, 228 F.2d 934 (5th Cir. 1955).

to set up and is to be distinguished from activities allowed for the employees' convenience, such as the post-work showers in *Mitchell* v. *Southeastern Carbon Paper Co.*, 228 F.2d 934 (5th Cir. 1955).

We are nevertheless satisfied that Congress did not intend the Fair Labor Standards Act to apply to these activities and that in fact it does not apply. In *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947) and *Walling* v. *Nashville, Chattanooga & St. Louis Railway*, 330 U.S. 158 (1947), both litigated before the Portal-to-Portal Act was enacted, the Supreme Court held that employers who furnished training to potential employees, were not required under the Fair Labor Standards Act to compensate trainees for time spent in the training program.[2] Even though the trainees were hired if they successfully completed the program, the Court did not deem them employees but compared their status to that of students. To justify excluding persons whose status was that of a student from the coverage of the law, the Court noted that 29 U.S.C. § 214 permitted employers to pay less than minimum wages to learners and apprentices providing that the Administrator of the Wage and Hour Division of the Department of Labor approved. The justification for this provision was and is that apprentices are entitled to be compensated at the minimum wage for the productive work content of their activities but not for the educational or training content which was for their own benefit. Administrative approval of wages less than the minimum is necessary only to prevent employers from paying less than the minimum wage to "apprentices" who were not actually receiving any training.

According to these Supreme Court decisions, if G.E.

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[2] The training was not work-training. The trainees performed no work for the company until they successfully completed the training program.

did not employ appellants as workers but provided only training programs which they were required to complete successfully before they could be employed as journeymen, appellants would be entitled to no compensation. The fact that in addition to such a program, G.E. also provides work-training for which it pays well above the minimum wage would not seem to be sufficient to require that the minimum wage be paid for the outside classroom study.[3] G.E. compensates its apprentices in their status as workers but does not compensate them in their status as students.

Although the Portal-to-Portal Act was not law when the Supreme Court decided *Portland Terminal* and its companion, *supra*, it would not seem to require that the apprentices be compensated in their student status. The legislative history of that Act reveals that it was designed to limit rather than expand the coverage of the Fair Labor Standards Act.[4] We think that it is consistent with the spirit of both the Portal-to-Portal Act and the Fair Labor Standards Act to say that as a matter of law, the principal activity of the apprentices as employees is the work that takes place during their regular 40 hour work-training week and that activity as students pursuing their required courses of study is neither integral nor indispensable to that principal activity.

Our holding is bolstered by the Department of Labor Regulation, 29 C.F.R. § 785.32, which states that employers do not have to pay apprentices for supplemental training programs if the training programs substantially comply

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[3] G.E. might be able to pay less than minimum wages for the work-training aspect of its program if it obtained approval from the Administrator of the Wage and Hour Division under 29 U.S.C. § 214. If G.E. in fact did obtain approval, it might compensate for both the classroom activity and the work-training but at a rate far enough below the minimum wage so that the apprentices would earn less than they do now.

[4] *See* H.R. Rep. No. 71, Portal-to-Portal Act of 1947, Feb. 25, 1947 in 1947 *U. S. Code Congressional Service*, 1029.

with the fundamental standards of the Bureau of Apprenticeship and Training. There is no material issue of fact as to whether or not G.E.'s program does substantially comply.[5] Appellants make no attempt to argue that G.E. does not comply with 11 of the 12 standards set forth in publications of the Bureau of Apprenticeship and Training. They claim there is an issue of fact as to whether there is compliance with the requirement of employee-employer cooperation on the basis of an affidavit which indicates that the union would like to have more influence over some aspects of the apprenticeship program. To the extent that, if proved, a latent union-management dispute over a part of the program would cast doubt on the existence of complete employee-employer cooperation, we find that doubt is not sufficient to show that a *substantial* compliance has not been obtained.[6]

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[5] Appellants claim that the fundamental standards of the Bureau of Apprenticeship and Training are not those contained in publications of that Bureau but are the requirements with which apprenticeship programs must comply before the Administrator of the Wage and Hour Division will approve a program that pays less than the minimum wage. These requirements are set forth at 29 C.F.R. § 522.1 *et seq.* It seems obvious to us that there are two different sets of standards. Quite understandably, the standards for employers paying less than the minimum wage would be stricter than the fundamental standards. Appellants base their entire argument on an ambiguous statement published in the Federal Register over 15 years ago to the effect that the standards of 29 C.F.R. § 522.1 *et seq.* have been adopted by the Bureau of Apprenticeship. The fact that these standards were adopted does not mean that they are the fundamental standards to which § 785.32 refers; it means rather that they were adopted for precisely what they were: the standards for programs that pay less than the minimum wage. While conceivably there might exist a factual question whether G.E.'s program substantially complied with standards governing programs paying less than the minimum wage, there is none as to substantial compliance of the program with the standards relevant to it. *See* n. 7, *infra.*

[6] Appellants' contention concerning employee-employer cooperation is bootstrapped from their confusion over which two sets of standards are those referred to in 29 C.F.R. § 785.32. *See* n. 6, *supra.* Whereas the fundamental standards require employee-employer cooperation, the standards set forth in 29 C.F.R. § 522.1 *et seq.* require joint

We note that the Wage and Hour Administrator has specifically approved G.E.'s Lynn program as not requiring compensation for time spent pursuing classroom studies. Opinion Letter No. 996, CCH Labor L. Rptr., Wages-Hours ¶ 30,998.22. Admittedly, that letter was based on 29 C.F.R. § 785.31 which seems to concern voluntary programs, but as appellee indicates, voluntary programs are only an example of the application of that regulation.[7] This determination by the Department of Labor, which has special competence in this area of the law, is entitled to considerable weight in this court.[8]

Finally, we must consider appellants' contentions that even if the classroom activities are preliminary or postliminary and thus exempted from the coverage of the Fair Labor Standards Act by 29 U.S.C. § 254(a), they must still be compensated under 29 U.S.C. § 254(b). The latter subsection provides that even if an activity is preliminary or postliminary, it is still compensable if there is a custom or practice of paying employees for their time spent on the activity but only if payment is "not inconsistent with

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agreement between the employer and the bona fide bargaining agent. 29 C.F.R. § 521.3(F). Appellants attempt to incorporate this latter standard into the former in order to create a factual issue, but the fundamental standard speaks of cooperation, not agreement, and with employees, not bargaining units. G.E.'s affidavits establish that cooperation, if not agreement, exists.

[7] We see no merit in appellants' contention that we must exclude this letter because it was addressed to G.E.'s attorney, a former member of the Department of Labor. The regulation on which appellants rely concerns former employees practicing before the Department in connection with cases or administrative proceedings that were pending before their old section of the Department during their time of employment. Informal inquiries at the time of the attorney's employment do not constitute a pending case or proceeding. Furthermore, the informal inquiries were addressed to a different bureau than the one to which appellee's attorney was attached.

[8] *L. Gillarde Co.* v. *Joseph Martinelli & Co.*, 169 F.2d 60 (1st Cir. 1948), *cert. denied*, 335 U.S. 885 (1948); *Roland Electric Co.* v. *Walling*, 326 U.S. 657, 676 (1946); *United States* v. *Correll*, 389 U.S. 299 (1967).

a written or non-written contract" between the employee and the employer. G.E. apprentice contracts contain the following provision:

> "The apprentice shall not be paid for attendance time at classroom exercises or lecture courses held outside of regular working hours."

Thus, even if we were to accept appellants' argument that the small bonus, granted to trainees when they successfully completed the program, was customary compensation within the meaning of the Act, they would still not be entitled to compensation because their contracts are inconsistent with that custom.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 67-223-C

WILLIAM R. BALLOU, ET AL.,

PLAINTIFFS,

v.

GENERAL ELECTRIC COMPANY,

DEFENDANT.

OPINION
March 26, 1970

CAFFREY, D.J.

This is a civil action brought by and on behalf of a group of apprentice employees against General Electric Company. Jurisdiction of this court is based on 28 U.S.C.A. 1337. The cause of action is based on 29 U.S.C.A. 216(b), for alleged violations of 29 U.S.C.A. 206, 207.

The matter came before the court on defendant's motion for summary judgment. The motion is based upon the pleadings and is supported by a 60-page affidavit of Gilbert K. Richter, defendant's Personnel Manager, together with voluminous exhibits thereto. The motion is opposed by a 14-page affidavit, with exhibits attached, of Peter DiCicco, Business Agent of Local 201, International Union of Electrical, Radio & Machine Workers, AFL-CIO. Defendant, as the moving party, filed a 74-page memorandum of law in support of its motion, as well as a 30-page reply memorandum. Plaintiff filed a 52-page brief in opposition to the motion, with voluminous appendices thereto, a 24-page reply brief in opposition, with additional appendices, and, finally, a 3-page memorandum in opposition to the allowance of defendant's motion.

The facts which give rise to this litigation are set out in the opinion of the Court of Appeals for this Circuit in *Ballou v. General Electric Co.*, 393 F.2d 398 (1968). In remanding the case, the Court of Appeals observed (pp. 400-401):

> "The question of what activities are principal and what are postliminary must be viewed in the light of two companion cases decided by the Supreme Court. *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). In these cases the Court said that an activity is principal if it is 'an integral and indispensable part of the principal activity of the employment.' ... we are reluctant to decide on a barren record whether the activities here are principal or postliminary. Also, we think it would be improvident to speak more fully on the issues presented here until the district court decides this point on the basis of a more complete record. Accordingly, we remand for a determination of this issue."

The present state of the record, consisting as it does of over 500 pages of affidavits and appended documents, plus 183 pages of briefs addressed to the motion for summary judgment, would seem to have passed beyond the state of barrenness, and it would appear that the question now before the court, on the basis of the more complete record, is whether or not the time spent by apprentices in classroom studies is exempt from the provisions of Sections 6 and 7 of the Fair Labor Standards Act, by reason of the provisions of Section 4 of the Portal-to-Portal Act, 29 U.S.C.A. 254, which requires that an employer compensate its employees for "principal" activities, but excuses an employer from compensating its employees for activities which are "preliminary" or "postliminary" to the principal activity. Activities which are characterized as preliminary or postliminary are compensable only

upon allegation and proof of either a contract so providing or a custom or practice so providing.

Thus, the first issue to be resolved is whether attendance at classroom work under defendant's apprenticeship program may be ruled to be principal, preliminary, or postliminary, under the provisions of the statute. The determination of this question is a ruling of law, dependent upon the construction of the voluminous documentation now on file. The plaintiffs in this case are apprentices who are employed by the defendant in one of the seven following occupations:

(a) All Around Production Machinist
(b) Pipefitting
(c) Structural Steel and Ironwork
(d) Machine Tool Maintenance
(e) Machinist-Toolmaker
(f) Industrial Electronics
(g) Electrician

The Richter affidavit, at pages 39 to 41, establishes that the principal activity of defendant's apprentices is their regular forty-hour work week. Exhibits 4, 6 and 8 to the Richter affidavit, and pages 3, 5 and 6 of the Ironworkers, Plumber-Pipefitters, and All-Around Machinists Apprentice Manuals, contained in Exhibit 2 of the Richter affidavit, establish that any training necessary to the performance of the particular job for which any given apprentice is employed is provided then and there to that employee, as on-the-job training, during the course of the regular forty-hour work week, quite independently of any classroom study under the apprenticeship program. Pages 39 to 53 of the Richter affidavit make it abundantly clear that the classroom portion of the apprenticeship program is supplementary, and only supplementary, to the principal activity of the apprentice. Nothing contained in the DiCicco affidavit, or the attachments thereto, raises a genuine issue

of material fact as to the nature of the apprentice's regular work vis-a-vis the nature of the apprentice's classroom training under the apprenticeship program. Consequently, plaintiff has failed to bring this case within the language contained in the opinion of the Court of Appeals for this Circuit in *Wirtz* v. *Marino*, 405 F.2d 938, 940 (1969):

> "There is no exemption for activities performed before or after regular hours of work . . . where they are an integral part of and indispensable to [the employees'] principal activities."

On the record presently before the court, it cannot be ruled that the classroom activities of the apprentices herein are "an integral part of and indispensable to" the apprentices' regular work at General Electric. The instant record makes the fact situation before this court distinguishable from the type of situation found by the Supreme Court to be present in the *Steiner* and *Mitchell* cases, *supra*, in both of which cases the Supreme Court ruled that because of the peculiar circumstances attendant upon the business activity involved in the basic forty-hour week of the employees in those cases, i.e., working with caustic and toxic materials in the one case, and working with knives which needed sharpening in the other case, the extra time involved, respectively, in showering and knife-sharpening, could be found to be an indispensable part of the principal activity of the employees in those cases. Consequently, I rule that the apprentice training classroom work involved herein is not a principal activity of plaintiffs, and I rule that on this record there is no genuine issue of material fact with regard thereto.

Plaintiff's contention that the classroom work of apprentices is "hours worked," under 29 C.F.R. 785.32, is effectively rebutted by pages 39 to 41 of the Richter affidavit, and also by page 7 of each of the six Apprentice Training Manuals contained in Exhibit 2 to the Richter affidavit.

The contention is also rebutted by the affidavit of Clarence T. Lundquist, an attorney for defendant, in Exhibit B to which affidavit it also appears that time spent by apprentices in classroom work does not involve either productive work or the performance of the apprentice's regular duties. More important, than the fact that this contention is so rebutted, is the fact that plaintiff has supplied nothing to create a genuine issue of material fact tending to support his contention. Further rebuttal is found in the fact that the apprenticeship program substantially meets the standards of the Bureau of Apprenticeship and Training of the Department of Labor, as appears from pages 1 and 2 of Exhibit A to the Lundquist affidavit. See, also, appendix to memorandum of General Electric, containing the text of Department of Labor Opinion Letters, particularly Opinion Letter No. 431, dated March 1, 1966. *CCH Labor Law Rpts.*, par. 30,966.68.

Plaintiff's attempt to seek solace herein by resorting to the argument that defendant has failed to comply with the provisions of Regulation 29 C.F.R. 521.3, goes wide of the mark, since compliance or substantial compliance with that regulation is required only in cases where the employer seeks to obtain from the Department of Labor a certificate authorizing it to employ apprentices at wages lower than the minimum wages applicable under Section 6 of the Act. There is no issue in this case relative to defendant's seeking authorization to pay lower than the minimum wage, and there is no relationship between the standards enunciated in 29 C.F.R. 521.3 and the requirements set out in 29 C.F.R. 785.32.

In the light of the above ruling, the remaining legal question for resolution herein is whether, although postliminary in nature, nevertheless, attendance in the apprenticeship classroom is made compensable by either a contract

expressly so providing or by a custom and practice to that effect.

An examination of Exhibit 1 to the Richter affidavit shows that it contains four different printed forms of employment contract used by General Electric in dealing with its apprentices. Each of these four standard form contracts bears the caption "Apprentice Agreement," and each of them contains the identical sentence:

> "The apprentice shall not be paid for attendance time at classroom exercises or lecture courses held outside of regular working hours."

Plaintiff has neither alleged nor created a genuine issue of material fact as to the incidence of any custom or usage which involves paying apprentices for classroom attendance of the type involved herein. Accordingly, defendant's motion for summary judgment is allowed.

ANDREW A. CAFFREY
U.S. District Judge

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 7039.

WILLIAM R. BALLOU ET AL.,
PLAINTIFFS, APPELLANTS,

v.

GENERAL ELECTRIC COMPANY,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Albert L. Goldman, with whom *Angoff, Goldman, Manning & Pyle* was on brief, for appellants.

Laurence S. Fordham, with whom *John G. S. Flym*, and *Foley, Hoag & Eliot* were on brief, for appellee.

April 22, 1968.

McENTEE, *Circuit Judge*. The issue presented in this case is whether class attendance and study exercises required of apprentices are principal activities as that term is used in section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254.

Plaintiffs filed a complaint against their employer, General Electric Company, to recover payment of minimum and overtime wages for time spent as apprentices in required class attendance and study exercises. This time, which alone is in issue here, was in addition to at least

forty hours a week spent in regular and customary work for apprentices at the General Electric plant.

Defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b), and the district court allowed this motion. Plaintiffs' motion for reconsideration asserted that the complaint did state a cause of action, and that in any event they should be granted leave to amend. The denial of this motion gave rise to the instant appeal.

The order of the district court in allowing the motion to dismiss was somewhat cryptic and defendant argues that it should be affirmed on either of two theories, one relating to form, the other going to the merits. First, the Portal-to-Portal Act distinguishes between activities that are principal on the one hand and those that are preliminary or postliminary on the other. Only activities that are principal give rise to work time under the Act. Defendant argues that plaintiffs have not alleged that the time devoted to class and study is a principal activity and that, indeed, by contrasting this time with the "regular and customary" work of apprentices plaintiffs somewhat suggest the opposite. According to this theory the complaint was properly dismissed as a matter of pleading; further, leave to amend was appropriately denied since no copy of a proposed amendment was ever submitted. In the alternative, defendant contends that the court properly granted the motion to dismiss on the merits, since plaintiffs are seeking compensation for activities that are postliminary rather than principal within the meaning of the Portal-to-Portal Act.

We are unable to accept the theory that the district court should have dismissed or did dismiss the complaint merely as a technical matter of pleading. "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which will entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). We think that in this case quite enough was alleged to give defendant fair notice of the basis of plaintiffs' claim. See 1A Barron and Holtzoff, Federal Practice and Procedure 52-56 (Wright ed. 1960). In any event, it would have been necessary to give plaintiffs an opportunity to amend if this were merely a matter of deficient pleadings. Fed. R. Civ. P. 15(a). In *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 322 (2d Cir. 1957), Judge Clark indicated why "outright dismissal for reasons not going to the merits is viewed with disfavor in federal courts." See 2A Moore's Federal Practice 1775-76 (2d ed. 1967)

> "But such allegation [of contract or custom providing for payment] would not seem to be required if the suit is for compensation for what the pleader claims and describes as an integral part of the employee's principal activities, i.e., non-portal-to-portal activity. Again amendment should be allowed to furnish required allegations, if they can be supplied in good faith by the pleader."

Defendant, however, urges that whatever the usual rule, in this case dismissal with prejudice is condign because plaintiffs did not submit a copy of any proposed amendment to their pleading. The difficulty with this is that plaintiffs were never informed that their complaint was improperly drawn. Defendant's objections on this score represented only an alternative theory of defense and as already indicated there is no reason to believe that it was accepted by the court. See *Bonnano* v. *Thomas*, 309 F.2d 320 (9th Cir. 1962) and *Griffin* v. *Locke*, 286 F.2d 514 (9th Cir. 1961), for the suggestion that if a complaint is dismissed for failure to state a claim upon which relief could be granted, other than on the merits, not only should leave

to amend be granted but for their guidance in amending, plaintiffs should also be informed of the reason. Cf. *Topping* v. *Fry*, 147 F.2d 715 (7th Cir. 1945). We agree that the court should have explained its action.

It is necessary, therefore, to consider the merits of the complaint. The question of what activities are principal and what are postliminary must be viewed in the light of two companion cases decided by the Supreme Court. *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). In these cases the Court said that an activity is principal if it is "an integral and indispensable part of the principal activity of the employment." *Steiner, supra* at 256. In that case employees changed their clothes and took showers in a plant where caustic and toxic materials were used extensively. The Court concluded that although shower and change time would not ordinarily be indispensable to a principal activity, it was indispensable in the peculiar circumstances of this case.[1] Among other considerations the Court was influenced by the fact that Tennessee law required employers in the industry to supply facilities for showering and changing. *Steiner, supra* at 250.[2] Similarly in *King Packing,*

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[1] See remarks of Senator Cooper, 93 Cong. Rec. 2297-2298 cited in *Steiner* v. *Mitchell*, *supra* at 258, especially: "In accordance with our intention as to the definition of 'principal activity,' if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity. On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable."

[2] Plaintiffs also call to our attention *Wirtz* v. *Healey*, 227 F.Supp. 123 (W.D. Ill. 1964) and *Chepard* v. *May*, 71 F.Supp. 389 (S.D. N.Y. 1947). In *Healey*, however, the school time was only one of a multitude of facts considered and no details were provided as to when it was given or its relationship to the employees' basic activities. We cannot regard this case as persuasive authority. *Chepard* was a pre-Portal-to-Portal case.

where knifemen in a meat-packing plant sharpened their knives out of scheduled work hours, the Court concluded that this was indispensable to the present activity.

The circumstances in the present case are quite different. An apprenticeship program not supplemented by evening instruction does not seem fairly comparable to knifemen without sharpened knives.[3] Still, in this area of controversy and complexity, we are reluctant to decide on a barren record whether the activities here are principal or postliminary. Also, we think it would be improvident to speak more fully on the issues presented here until the district court decides this point on the basis of a more complete record. Accordingly, we remand for a determination of this issue.

Judgment will be entered vacating the judgment of the district court and remanding the case for proceedings consistent with this opinion.

[3] See, for example, 29 C.F.R. § 521.3 which discusses standards of apprenticeship. Subsection (i) provides for "[r]elated instruction, if available." This is a rather bland formula if it is intended to describe something indispensable and integral to the principal activity.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 67-223-C

WILLIAM R. BALLOU and JOHN F. KROL,

PLAINTIFFS,

v.

GENERAL ELECTRIC COMPANY,

DEFENDANT.

MEMORANDUM and ORDER
June 22, 1967

CAFFREY, D.J.

This matter came before the Court on defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The matter was submitted for determination on the basis of written memoranda of law.

It appears that plaintiffs herein have brought a class action on behalf of themselves (and others employed by the defendant), claiming that they are entitled to minimum and overtime wages, under Sections 6 and 7 of the Fair Labor Standards Act, for time which they have spent in connection with classroom instruction supplementary to the "regular and customary work" of apprentices. Plaintiffs say that they work at least forty hours per week in regular work and that the instruction periods for which they now seek compensation at the rate of time and one-half should be considered as overtime work under the provisions of 29 U.S.C.A. 206, 207.

I am persuaded that plaintiffs have failed to state a cause of action by reason of the provisions of Section 4 of the Portal-to-Portal Act, 29 U.S.C.A. 254, and section 785.32 of

the regulations of the Wage and Hour Administrator.

ORDERED: Defendant's motion to dismiss the complaint is allowed.

U.S. District Judge

APPENDIX F

FAIR LABOR STANDARDS ACT OF 1938, 52 STAT. 1060, 29 U.S.C.A. SECTIONS 206 AND 207

Section 6:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section; . . .

(The previous statutory rate, in part, material to this case, was $1.25, 75 Stat. 65. The effective date of the Fair Labor Standards Amendments of 1966 is February 1, 1967, 80 Stat. 830.)

Section 7:

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. (Prior to September 23, 1966, at all times material to this case, the Act read as above except for the added language, "or is employed in an enterprise engaged in commerce or in the production of goods for commerce" which was added by the Fair Labor Standards Amendments of 1961, 75 Stat. 65.)

PORTAL-TO-PORTAL ACT OF 1947, 61 STAT. 84, 29 U.S.C.A. SECTIONS 254(a)

Section 4:

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Title 29, Part 785, Code of Federal Regulations, 29 C.F.R. 785.

LECTURES, MEETINGS AND TRAINING PROGRAMS

Section 785.27—General.

Attendance at lectures, meetings, training programs and similar activities need not be counted a working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) attendance is in fact voluntary;

(c) the course, lecture, or meeting is not directly related to the employee's job; and

(d) the employee does not perform any productive work during such attendance.

SECTION 785.28—INVOLUNTARY ATTENDANCE.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

SECTION 785.29—TRAINING DIRECTLY RELATED TO EMPLOYEE'S JOB.

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

SECTION 785.30—INDEPENDENT TRAINING.

Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

SECTION 785.31—SPECIAL SITUATIONS.

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

SECTION 785.32—APPRENTICESHIP TRAINING.

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and

(b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

APPENDIX G

CURRICULUM OF CRAFT PROGRAMS

1. *ELECTRICIAN APPRENTICE TRAINING PROGRAM*

FIRST YEAR:

FIRST SEMESTER	*SECOND SEMESTER*
Measurement and W-31 Introductory Elec. Wiring	W-31 Introductory Electric Wiring

SECOND YEAR:

W-33 Advanced Electric Wiring	W-34 Advanced Electric Wiring

THIRD YEAR:

W-41 National Electric Code

TOTAL HOURS OF SCHEDULED CLASSROOM PERIODS: 378 HOURS

2. *ALL ROUND PRODUCTION MACHINIST PROGRAM**

FIRST YEAR:

FIRST SEMESTER	*SECOND SEMESTER*
Practical Shop Math & Algebra Elementary Blue Print Reading Measurement, Safety & Layout	Trigonometry Advanced Blue Print Reading

SECOND YEAR:

Tool And Die Design Applied Strength of Materials	Tool and Die Design Metallurgy

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* The MACHINE TOOL MAINTENANCE PROGRAM and the IRON WORKER PROGRAM require the same course curriculum and the same total of scheduled hours.

THIRD YEAR:

Fundamentals of Automated Machine Controls Industrial Hydraulics	Mechanics

TOTAL HOURS OF SCHEDULED CLASSROOM PERIODS: 614 HOURS

3. *INDUSTRIAL ELECTRONICS PROGRAM*

FIRST YEAR:

FIRST SEMESTER	*SECOND SEMESTER*
MA-11 Trigonometry PH20,21 Physics	MET-3A Engineering Drawing MA-12 Introduction to Calculus

SECOND YEAR:

MA-13,14 Calculus EET 10A Fundamentals of Electronics	EET-13A Electric Circuits

THIRD YEAR:

EET-15 Fundamentals of Electronics	EET-19 Electronic Circuits I EE-20A Electronic Measurements I

FOURTH YEAR:

EET-23 Electronic Circuits II EET-26 Electronic Measurements II	EET-22 Transistor Circuits

TOTAL HOURS OF SCHEDULED CLASSROOM PERIODS: 672 HOURS

4. *PIPEFITTING PROGRAM*

FIRST YEAR:

FIRST SEMESTER	*SECOND SEMESTER*
Measurement, Safety and Layout B-51 Layout for Plumbers	B-52 Layout for Plumbers

SECOND YEAR:

B-41 Design of Heating Systems	B-42 Design of Heating Systems Rigging and Welding

THIRD YEAR:

B-43 Design of Vent. and Air-Conditioning System	B-44 Design of Vent. and Air-Conditioning System Industrial Hydraulics

5. *MACHINIST TOOLMAKER PROGRAM*

1. The curriculum for the four-year program included sixteen courses: College Algebra, Applied Algebra, Motion and Time Study, Mechanical Drawing, Trigonometry, Electricity, Electronics, Numerical Controls, Tool Design, Applied Strength of Materials, Applied Engineering Mechanics, Metallurgy, Applied Physics, Hydraulics, Technical Writing and Economics.

2. The curriculum of a four-year program with related classes at a university included thirteen courses: Chemical structures, Engineering Graphics, Calculus, General Physics, Composition and Literature, Differential Equations, General Physics, Applied Mechanics, General Economics, Introduction to Electric Circuit Analysis, Thermodynamics, Fluid Mechanics, and Introduction to Machinery Design.

TOTAL HOURS OF SCHEDULED CLASSROOM PERIODS: 713 HOURS

APPENDIX H

THE FUNDAMENTAL STANDARDS OF THE BUREAU OF APPRENTICESHIP AND TRAINING

The starting age of an apprentice to be not less than 16.

Full and fair opportunity to apply for apprenticeship.

Selection of apprentices on the basis of qualifications alone.

A schedule of work processes in which an apprentice is to receive training and experience on the job.

Organized instruction designed to provide the apprentice with knowledge in technical subjects related to his trade (a minimum of 144 hours per year is normally considered necessary).

A progressively increasing schedule of wages.

Proper supervision of on-the-job training with adequate facilities to train apprentices.

Periodic evaluation of the apprentice's progress, both in job performance and related instruction.

The maintenance of appropriate records.

Employee-employer cooperation.

Recognition for successful completions.

Non-discrimination in all phases of apprenticeship employment and training.

APPENDIX 1

OPINION LETTER OF WAGE-HOUR ADMINISTRATOR.

OPINION LETTER NO. 467, JUNE 14, 1966.

This replies to your letter of May 18, 1966, concerning the meaning for purposes of section 785.32 of Interpretative Bulletin, Part 785, of the requirements of "substantially conforming with" the standards of the Bureau of Apprenticeship and Training of the U. S. Department of Labor. You note that section 521.3(c) of Regulations, Part 521, indicates that an apprenticeship program must be registered with the U. S. Department of Labor, and inquire, in effect, whether section 785.32 applies if the apprenticeship program has not been registered.

The Fair Labor Standards Act requires that covered employees be paid a minimum wage of not less than $1.25 an hour for all hours worked and overtime compensation at a rate of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. This requirement applies to apprentices as well as journeymen. However, section 785.32 provides that when an apprentice in a bona fide apprenticeship program spends time in receiving related, supplemental instruction, such as in a classroom where no productive work is performed, that time does not have to be counted as hours worked under certain circumstances. In order to qualify under this section, the apprenticeship program in which the apprentice is working must substantially meet the fundamental standards of the Bureau of Apprenticeship and Training. The WHPC Divisions will consider that a program complies with such standards if the program has been registered and approved by a State apprenticeship agency approved by the Bureau of Apprenticeship and Training or by the

Bureau itself. If the program is not so registered, section 785.32 is inapplicable.

It is possible, however, that the training program you have in mind may meet the tests in section 785.32 or may qualify as a special situation under section 785.31.

APPENDIX j

U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Divisions

Washington, D.C. 20210

June 3, 1969

[MAIL]

Subject: Supplemental Related Training
To: Mr. Clarence T. Lundquist
Counsel
McDermott and Russell
Washington Building
Washington, D.C. 20005

Re: General Electric Company
Apprentice Training
Program at Lynn, Massachusetts

In response to your question concerning hours worked under the Fair Labor Standards Act, we have reviewed the materials submitted by you which describe a training program conducted by your client to qualify workers for journeyman status in certain occupations involving skills required in your client's operations. The program, which requires three to four years to complete, combines on-the-job training with classroom instruction, in which homework assignments are made by the class instructors. You have inquired whether the time spent by the trainees in the classes and in the homework assignments may be excluded from hours worked in computing pay for the trainees under the Fair Labor Standards Act, pursuant to the principles governing special situations as set forth in 29 CFR 785.31. Based upon the information you have submitted, exclusion of such time from hours worked would, in our opinion, be permitted under the act.

The employees are paid for their on-the-job training at

specified percentages of the journeyman's rate, rising in steps over the training period as occupational skills are developed in the course of the program. The training manuals supplied to participants make it clear that no pay is contemplated for classroom time or time spent in homework assignments, stating that such time "is not considered hours worked."

The training course is not confined to workers already employed by the company. Application for the course appears to be voluntary, and those permitted to participate are selected on a competitive basis from high school graduates not previously employed by the company as well as workers already in its employ who are found to be best qualified for the training. The classroom training continues throughout the training period and is given outside regular working hours spent in the on-the-job activities (a basic 40-hour week). It consists of courses in subjects customarily taught in independent schools offering post-high school technical education. They do necessarily have a bearing on the trainee's understanding of the technical skills which he is being taught on the job.

The classroom instruction is given by instructors from independent educational institutions and by qualified senior employees of the company. Many of the courses are given in the classrooms of the educational institutions; others may be given in in-plant classrooms. The employer pays the trainee's tuition; the trainee pays for textbooks and supplies. Grading standards for the courses appear to be typical of independent schools. If the trainee has previously received academic credit in an educational institution for a course or courses comparable to a course or courses in the program curriculum, and if the course content and grade performance are found to justify it, repetition of such courses by such trainee is not required. Satisfactory completion of the classroom work as well as the OJT

course is a requisite for graduation and the award of a certificate or diploma under the training program. Graduates are offered jobs as journeymen in the occupations for which they are trained and most remain with the company, although some do not. Many graduates advance to higher positions.

In the light of these circumstances and the other information submitted concerning the program, it appears that the classroom instruction and attendant homework is primarily of benefit to the employee and of such a character that the time spent therein may be excluded from compensable hours worked pursuant to the provisions of 29 CFR 785.31.

Robert D. Moran
Robert D. Moran
Administrator

APPENDIX K

OPINION LETTER OF WAGE HOUR ADMINISTRATOR

OPINION LETTER 272, JULY 10, 1964

Four-Year Training Program

This is in further reference to your letter of January 18, 1964, addressed to the attention of the Secretary of Labor, regarding the application of the Fair Labor Standards Act to your firm's Employee Training Program, which consists of a four year work/study period.

The highlights of your program pertinent to the Act, as presented in the material you submitted, are as follows:

1. Hourly starting rate of $1.25 an hour advancing, in successive stages, to $3.00 after 48 months.

2. All overtime will be paid at one and one-half times the hourly rate.

3. Trainees will work as other employees but will be given a comprehensive course of study and instructions.

4. Trainees will be assigned courses of night study at selected educational institutions. Tuition and other fees and books will be paid for by the company. No payment for hours of class, transportation or study will be made.

5. Course of instruction will include desk work and training as well as manual work and training.

6. The company will make contributions to a special reserve account beginning with $2.00 weekly and progressing after 30 months to $30 weekly, so that at the end of 48 months, the trainee will have a total of $4,180 earmarked for him.

7. On completion of the course, the trainee will receive a cash bonus of $1,500 and for the next two years on the anniversary date, $1,000, and on the third anniversary, the total remaining balance, including interest accumulations.

8. If trainee or (subsequently) trained employee is released by the company for reasons of lack of business or lay off, the company will pay, in cash, an amount equal to the total sum in the above mentioned special reserve account, plus interest.

9. The company has a company paid hospitalization plan and a company and employee participation paid sickness benefit plan applicable to all employees, including trainees.

10. Each trainee must buy a $65 box of tools, payable by deductions of $3 per week until paid.

The Fair Labor Standards Act requires that every employee who is within its coverage and not specifically exempt from its monetary provisions must be paid not less than the statutory minimum wage for every hour that he works in the work-week and overtime compensation at a rate of not less than one and one-half times his regular rate of pay for all hours worked in excess of the statutory maximum workweek.

"Hours worked," within the meaning of the Act, is discussed in detail in the enclosed Interpretative Bulletin, Part 785 [WHM 93:101], Sections 785.27 through 785.32 of which specifically relate to attendance at training programs. As explained in Section 785.27, attendance at lectures, meetings, training programs and similar activities, need not be counted as working time if (a) attendance is outside of the employees' regular working hours, (b) attendance is in fact voluntary, (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance. Based on these criteria, it would appear that the time spent by your trainees in taking courses at night would be considered hours worked and, therefore, compensable under the Act.

As indicated above, the Act requires that an employee subject to its overtime requirements be paid at a rate of not less than one and one-half times the regular rate at which he is employed for all hours worked in excess of the applicable maximum workweek. Section 7(d) of the Act defines the regular rate as including "all remuneration for employment," except for certain payments specifically excluded under paragraphs 1 through 7 of that section. Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. In this connection, it appears that your payments to a special reserve account for each trainee, would be considered non-discretionary bonuses as discussed in Section 778.6(d) of the enclosed Interpretative Bulletin, Part 778 [WHM 94:51]. This section specifically indicates that "any bonus which is promised to employees upon hiring . . . would not be excluded from the regular rate under this subsection. Bonuses which are announced to employees to induce them . . . to remain with the firm are regarded as part of the regular rate of pay . . .

Your letter does not contain sufficient information for us to determine the applicability of Section 7(d)(4) of the Act to your firm's hospitalization and sickness benefit plans. In this connection, you are referred to Section 778.6(g) of the overtime compensation bulletin which discusses the various criteria which must be met in order that an employer's contributions to benefit plans be excluded from the regular rate.

With regard to the $65 box of tools which the trainee is required to buy and pay for at $3.00 per week, you are referred to Section 531.35 of the enclosed copy of Regulations, Part 531, [WHM 95:127] which interprets the provisions of Section 3(m) of the Act, as it relates to the exclu-

sion of facilities from wages. Regulations, Part 531.35 states in part: ". . . .For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the empoyer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act." Thus, it would appear that the tools required on the job constitute a capital expense, no part of which can be borne, either voluntarily or involuntarily, by the trainees from the compensation required to be paid to them under Sections 6 and 7 of the Act, even if they may prefer to own and use their own tools. Tools of the trade are primarily for the benefit and convenience of the employer and this cannot be questioned on the ground that such tools may be useful to the employee off the job as well as on the job. This position has been sustained by the courts. See Walling v. Peavy-Wilson Lumber Co., 49 F. Supp. 846 (3 WH Cases 232). Therefore, deductions for the purchase of the tools may not be made if they cut into the statutory minimum or overtime. In this connection, also see Section 531.37(a) of Part 531 for an explanation as to when deductions cut into the statutory minimum or overtime.

FILED
MAR 4
E. ROBERT SEAVER, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1295

WILLIAM R. BALLOU, et al.,
PETITIONERS,

v.

GENERAL ELECTRIC COMPANY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1295

WILLIAM R. BALLOU, et al.,
PETITIONERS,

v.

GENERAL ELECTRIC COMPANY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Questions Presented

1. Did the Court of Appeals correctly hold that petitioners' classroom time was not compensable under Sections 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. § 206-207?

2. Did the Court of Appeals correctly hold that petitioners' classroom time was not "principal activity" or "integral and indispensable" to such activity, and hence not compensable under Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254(a)?

3. Did the Court of Appeals correctly find support for its decision that petitioners' classroom time is not compen-

sable since there was compliance with 29 C.F.R. § 785.22, under which there is no compensation for classroom time in connection with an apprenticeship program which "substantially meets the fundamental standards" of the Bureau of Apprenticeship and Training, United States Department of Labor?

4. Did the Court of Appeals correctly find support for its decision that petitioners' classroom time is not compensable in an opinion to that effect of the Wage-Hour Administrator?

Statement of the Case

This is an action by past and present apprentices at the Lynn, Massachusetts plant of the defendant General Electric Company ("GE") who claim that the Fair Labor Standards Act entitles them to be paid for time spent receiving classroom instruction and doing homework. The 106 plaintiffs also seek overtime pay and double liquidated damages.[1]

After the Court of Appeals had refused to dismiss on the pleadings (393 F.2d 398; Petition, pp. 41-45), GE moved for summary judgment and filed a sixty-page affidavit (item 9) with several hundred pages of exhibits, as well as two shorter affidavits (items 11, 12), one of which set forth an opinion letter of the Wage-Hour Administrator holding that the Fair Labor Standards Act does not require pay for the time in question (item 11).[2] The apprentices filed a 14 page counteraffidavit of the business agent of the

[1] While the complaint purports to be brought on behalf of all similarly situated apprentices, only 106 apprentices have joined the action in the manner required by 29 U.S.C. § 216(b). There are at present about 225 GE apprentices at Lynn, not including alumni. (Record Appendix, item 9, p. 1).

[2] Citations by "item" refer to items in the record appendix filed by counsel for the apprentices in the Court of Appeals.

relevant union (item 10) and also relied on answers submitted by GE in response to interrogatories (item 7). The counteraffidavit deals almost exclusively with a single subissue as to whether one of twelve requirements of the Bureau of Apprenticeship and Training, United States Department of Labor—that of so-called "employee-employer cooperation"—was met.

On this record, the District Court granted summary judgment in favor of GE (Petition, pp. 35-40), and the Court of Appeals affirmed (Petition, pp. 27-34) and denied rehearing (Petition, p. 26).[3]

The undisputed facts emerging from the affidavits may be summarized as follows. GE's Lynn plant provides apprentice programs in a number of trades. Apprentices are chosen with a battery of tests and interviews (item 9, pp. 6-8, 20). They go through an elaborate schedule, covering several years of on-the-job training in useful skills relating to the trade for which they are being trained, much of this training being given in a special room about the size of a football field and containing equipment worth about $1,225,000 (item 9, pp. 8-10, 13, 39-41). Their progress is supervised, recorded, and rewarded; and many of them rise after their graduation to executive positions with GE and other employers (item 9, pp. 13-15, 19-20). For their on-the-job training, they are presently paid at rates that start at $2.295 per hour and rise to between $2.895 and $3.56; rates were of course lower in the past, but at all times far higher than the minimum wage then or now prescribed by the Fair Labor Standards Act (item 9, pp. 11-13). In fact, the petitioners' wages are so much higher per hour than minimum wages that their average compensation per hour exceeds the minimum hourly wage even including the

[3] Citations herein to the opinions of the Court of Appeals are to the Petition.

classroom and home study hours which, by agreement, are not compensated (item 9, p. 11).

The apprentices, and many other Lynn employees, are represented by a union, which most apprentices have chosen not to join (item 9, p. 15). Three apprentices are union shop stewards, and apprentice problems are discussed at plant-wide meetings between union and management which occur four or five times each month (*id.*). An informal understanding protects apprentices from being laid off during their training (item 9, p. 16). Also, apprentices are entitled to fringe benefits (e.g., vacations, employee discounts, pension and insurance plans) to the same extent as nonapprentices and benefit from the various rights conferred by the applicable collective bargaining agreement (item 9, pp. 12, 15-16, and Exhibit 10).

In addition to on-the-job training, apprentices receive "related instruction" for periods which have totalled between 510 and 756 hours, by far the most common total being 614 hours spread over three years (item 9, pp. 8-10). Most of this instruction is given in classrooms in the GE Lynn plant, and the remainder at nearby schools (item 9, p. 7). Related instruction is not necessary to enable an apprentice to perform production work, and in fact a large proportion of apprentices work from one to six months before they receive any related instruction at all (item 9, pp. 39-41). On the average 20 apprentices per month perform productive work full-time before they receive any related instruction at all (item 9, p. 39). Most of GE's journeymen have acquired their skills without classroom instruction (item 9, pp. 39-41). The course materials give the apprentices a basic education in technical fields related to, but not necessarily required by, their production work: some courses cover the theoretical bases of the techniques used on the job, and some introduce the apprentices to advanced theories and techniques used in other skilled, high-

paying jobs in or outside GE which they may ultimately reach after leaving the apprentice programs (item 9, pp. 35-39).

With rare exceptions, the apprentices are engaged in on-the-job training 8 hours a day, 40 hours a week, in apprenticeship programs which last between three and four years. Hours of work experience range from 6,000 to 8,000 hours, and hours of related studies range from a minimum of about seven percent to a maximum of about ten percent of total hours (item 9, pp. 9, 21; item 17).

Although GE pays all tuition expense, GE Lynn apprentices are not and never have been paid for related instruction (item 9, pp. 12-13).[4] Apprentice agreements explicitly provide that there is no pay for such related instruction, and apprentices are so informed before they join the programs (*id.*). It has never been claimed that the applicable collective bargaining agreements entitled apprentices to be paid for related instruction (item 9, Exh. 10).

It is for the time spent in related instruction, and in preparing for it and doing homework, that the plaintiffs seek pay, overtime, and liquidated double damages.

Opinion Below

The Court of Appeals' holding that compensation is not required is based on two independent grounds and finds support in two others. (a) The Court held that time spent by apprentices in benefitting from their classroom training is not "hours worked" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act. (Petition, pp. 30-31). (b) The Court also held that such time is not "principal activity" or "integral and indispensable" to "principal activity", and hence not compensable under

[4] The only exception is that certain apprentices released early to attend classes during their normal workday are nevertheless paid through the end of their shifts (*id.*).

section 4 of the Portal-to-Portal Act. (Petition, p. 31). (c) The Court observed that its conclusion was "bolstered" by GE's compliance with 29 C.F.R. 785.32 (Petition, pp. 31-32), which provides that such time is not compensable if the apprenticeship program "substantially meets the fundamental standards" of the Bureau of Apprenticeship and Training. (Petition, p. 51). (d) It also found "secondary and cumulative" support in an Opinion Letter of the Wage-Hour Administrator (Petition, pp. 58-60) that the Fair Labor Standards Act does not require pay for classroom time "primarily of benefit to the employee" such as the Administrator found to be involved in this case. (Petition, pp. 26, 33).

Argument

I. This Case Does Not Merit The Court's Attention.

This case does not merit consideration by this Court for the following reasons:

1. Lower court decisions do not conflict with respect to the issues attempted to be argued in the Petition; indeed, those issues are so insignificant that they have gone virtually unlitigated. Counsel is aware of only three reported cases (aside from the present one) dealing with the status of instructional programs under the Fair Labor Standards Act or Portal-to-Portal Act. All three were decided in 1947, two of them by this Court. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947); *Walling* v. *Nashville, C. & St. L. Ry.*, 330 U.S. 158 (1947); *Chepard* v. *May*, 71 F.Supp. 389, 393 (S.D.N.Y.) (1947). This granny of the law needs no further illumination.

2. The decision below turns on particular facts and lacks wide impact. When this case was previously before it, the Court of Appeals refused to dismiss the complaint

(Petition, p. 41). The Court in effect declined to rule that the classroom and homework time of apprentices is *never* compensable under the Fair Standards Act. GE then submitted an affidavit (item 9) describing in detail the particular classroom courses here at issue, their relation to the work of the apprentices in this case, and other relevant facts. As the opinion of the Court below shows, the resulting summary judgment was based on the specific facts before the Court. (Petition, pp. 27-29, 32).

3. The applicable law is well developed in numerous decisions of this Court, and all that was required in the instant case was application of established legal principles to facts thoroughly developed in over 500 pages of affidavits and appended documents.

The governing principles as to what activity is compensable under the Fair Labor Standards Act are stated in *Tennessee C. I. & R. Co.* v. *Muscoda Local 123*, 321 U.S. 590, 598 (1944):

> "Congress here was referring to work or employment . . . as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and *pursued necessarily and primarily for the benefit of the employer and his business.*" (Emphasis added.)

Accord, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-92 (1946); *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 163-66 (1945). *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947), and *Walling* v. *Nashville, C. & St. L. Ry.*, 330 U.S. 158 (1947), provide further guidance in application of these general principles to the status of instructional programs which benefit those who participate in them.

The issue before the Court of Appeals is whether, on the particular facts of this case, the related studies were "no-

cessarily and primarily" for GE's benefit. The Court below determined otherwise (Petition, pp. 30-31), as did the Wage-Hour Administrator, who determined that "the classroom instruction and attendant homework is primarily of benefit to the employee and of such a character that the time spent therein may be excluded from compensable hours . . . ." (Petition, p. 60). The facts pertinent to this issue are not disputed in any particular by the apprentices, and all that is involved is application of principles settled by this Court to undisputed facts.

The governing principles under the Portal-to-Portal Act, which is the Court of Appeals' second ground, are developed in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). This Court there held that an activity is compensable only if it is "an integral and indispensable part of the principal activity of the employment" (350 U.S. at 356), and that changing clothes in a chemical plant and sharpening knives in a meat packing plant outside of normal working hours were an "integral and indispensable" part of the employees' "principal activity" of productive work. On this issue, too, all that was required of the Court of Appeals was application of these principles to facts set forth in the Richter affidavit and attached exhibits (item 9), and not contested by the affidavit of any apprentice or by the 14 page affidavit of a union official (item 10). Mr. Richter's affidavit set forth in considerable detail pertinent facts which conclusively demonstrate that the principal activity of apprentices is their on-the-job training, which occupies them eight hours a day, five days a week, and over 90% of their time, and teaches them the requisite skills to do their jobs. Mr. Richter's affidavit contains a very thorough explication of the apprentice programs involved, including schedules of shop assignments, examples of typical production jobs performed by the apprentices, sum-

maries of the skills and techniques required to perform those jobs, schedules of class hours and typical homework requirements, summaries of the subject matter covered by each of the courses offered, and description of the relationship between the production work performed by the apprentices and their related studies (item 9, pp. 39-59); it contains a general explanation of the role of related studies in the GE apprenticeship programs at Lynn, and a detailed description of each program, including the skills necessary for on-the-job training of the apprentices in the several programs and the subject matter of the academic courses related to each of the programs (item 9, pp. 41-59). To cover adequately here the pertinent detail contained in the Richter affidavit would require quotation of nearly all the material set forth at pages 41-59 of the Richter affidavit and in many of the supporting exhibits, none of which is in any way controverted by the apprentices. In the case of each of the programs, the affidavit summarizes the kinds of jobs an apprentice would be required to do, the skills necessary to perform those jobs, and the time occupied by production work and related studies. The affidavit then reviews the subject matter of each of the courses in the program of related studies, showing that in each program some of the courses involve systematic reviews of the theoretical bases for the practical techniques learned on the job, and the other courses involve advanced material, intended to broaden the apprentices' technical education, which is not used on the job at all. In this way, the affidavit covers every course in every program involved here, and demonstrates as to each that the principal activity is production work, and the related studies are not "integral and indispensable" thereto.

The Petition thus does not dispute the governing principles, but only their application to the particular complex of facts in this case.

4. The decision below is supported by multiple grounds, none of which is of general importance, each of which turns on particular facts, and any one of which is adequate to support the decision.

The Court of Appeals' main ground is that, irrespective of the Portal-to-Portal Act, the apprentices in this case were not entitled to be paid for classroom instruction, in view of *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947). (Petition, pp. 30-31). To this main ground, the Petition devotes less than a page (pp. 10-11).

Second, the Court of Appeals held that, under the Portal-to-Portal Act, classroom time is neither a "principal activity" of these apprentices nor "integral and indispensable" to such an activity. (Petition, p. 31). The Petition devotes seven pages to this second ground, entirely in an effort to develop that, *on the facts of this case*, the activity in question is "principal" and "integral and indispensable" (pp. 9-15).

Next, the Court of Appeals stated that its decision was "bolstered" by GE's compliance with 29 C.F.R. § 785.32 (Petition, pp. 31-32). To this subsidiary ground, which is not essential to the Court's conclusion, the petition devotes more than nine pages (pp. 15-24), most of which are directed at a footnote, which is itself merely supplementary. Section 785.32 provides in substance that such time as is in question is not compensable if it "does not involve productive work or performance of the apprentices regular duties", which it does not in this case, and if the apprenticeship program "substantially meets the fundamental standards of the Bureau of Apprenticeship and Training." (Petition, p. 51). As more fully appears in Part III hereof, the "fundamental standards" contain twelve requirements; compliance with eleven of these is not even questioned. The Court of Appeals held that there was "substantial compliance" with the Bureau's "fundamental

standards" even assuming arguendo that the twelfth requirement of "employee-employer cooperation" was not met, and also that there was compliance with the twelfth standard of "employee-employer cooperation." (Petition, p. 32). The decision on this latter point, which occupies about one-half of the Petition's argument, turns upon detailed analysis of factual minutiae which certainly does not merit the attention of this Court.

Finally, the Court of Appeals observed that its decision was supported by an opinion of the Wage-Hour Administrator that the very time in issue was not compensable in the circumstances under 29 C.F.R. § 785.31. (Petition, p. 33).

The Administrator has found that the very classroom courses involved in this case need not be compensated. (Petition, pp. 58-60). His conclusion is, of course, entitled to great weight. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); *Roland Electric Co.* v. *Walling*, 326 U.S. 657, 676 (1946). The apprentices' criticism of the Administrator's opinion letter does not discuss any divergence by the Administrator from the statute or court interpretations, but claims that the Administrator misconstrued provisions *which he himself promulgated* (Petition, pp. 22-24). Courts are understandably reluctant to uphold claims that an agency does not understand its own words. E.g., *Immigration and Naturalization Service* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

Although the Court described its reliance upon the Administrator's decision under 29 C.F.R. § 785.31 as "secondary and cumulative" in denying a petition for rehearing (Petition, p. 26), and its reliance on 29 C.F.R. § 785.32 as having "bolstered" its decision, each can stand as an inde-

pendent ground of decision which is based on detailed factual analysis and is clearly correct. (See pp. 13-24).

5. Neither does this case involve any summary judgment problem. GE submitted to the District Court hundreds of pages of affidavits and exhibits (item 9, 11, 12). Since the action had been pending since 1967 and concerned classroom courses in which the plaintiff apprentices had themselves participated, they had ample opportunity to put their side of the case before the District Court. They submitted a 14 page affidavit (item 10), with exhibits not included in their Record Appendix. In upholding summary judgment on such a record, the Court of Appeals did not deviate from this Court's decisions. Indeed, the First Circuit has stringently confined summary judgment.[3] No jury trial is involved, since no jury was claimed. This Court should not be obliged to search through voluminous records merely on the claim that the lower courts, applying the correct summary judgment standard, somehow overlooked a lurking issue of fact that the plaintiffs cannot articulate.

6. Finally, the result below works no conceivable injustice. The plaintiff apprentices have had ample opportunity to present their case. The case has been heard twice by the District Court, and twice by the Court of Appeals. The apprentices received wages much in excess of what the Fair Labor Standards Act requires for their nonclassroom time, benefitted from a costly training program, and were informed in advance that they would not be paid for classes. The Wage-Hour Administrator and both lower courts have

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[3] E.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 28 (1970), *cert. denied*, 39 U.S. Law Week 3140 (1970); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 677 (1967); *Rogen v. Ilikon Corp.*, 361 F.2d 260, 265-66 (1966); *see also Colourpicture Publishers, Inc. v. Mike Roberts Color Prods., Inc.*, 394 F.2d 431, 435, *cert. denied*, 393 U.S. 848 (1968); *Rans v. Spencer*, 393 F.2d 108 (1968); *World Airways, Inc. v. Northeast Airlines, Inc.*, 358 F.2d 691 (1966).

found that compensation is not required, and there is no cause for this Court to reexamine the limited grounds on which those several decisions are based.

II. The Decision Of The Court Of Appeals Is Clearly Correct.

A. *The Apprentices' Classroom Time Would Not Have Been Compensable Even Before Enactment Of The Portal-To-Portal Act.*

As previously noted (pp. 7-8, *supra*), the "work" that is compensable under the Fair Labor Standards Act includes "*Exertion pursued necessarily and primarily for the benefit of the employer and his business.*" *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 163-66 (1945) (emphasis in original).

Petitioners' argument to this Court completely ignores the requirement that the activity be "necessarily and primarily" for the employer's benefit (Petition, p. 10). Apprentices are trained in a skilled trade satisfying the requirements of 29 C.F.R. § 521.4 (item 9, p. 24), which requires that the trade:

> "(f) Involves the development of skill sufficiently broad to be applicable in like occupations throughout an industry, rather than of restricted application to the products of any one company."

Teaching apprentices such a trade, one which qualifies them to perform a variety of tasks for a variety of employers,

obviously confers on them a very considerable benefit, particularly when they receive substantial pay while being taught.

The classroom portion of the apprentice program also predominantly benefits the apprentices. It is provided at GE's expense, and to a substantial extent at established educational institutions (item 9, p. 10). The bulk of the course material covered is of a theoretical, background nature that contributes to the education and future careers of the apprentices but is in no way needed for their on-the-job training work; even those courses which touch on skills also involved in on-the-job work are dispensable, and requisite skills are also taught on the job; apprentices often go many months doing acceptable on-the-job work before they even begin classroom studies; and most GE journeymen have never had any classroom instruction relating to their trades at all (item 9, pp. 39-59). As the Court of Appeals noted:

> "For the most part, the classwork does not relate directly to the skills apprentices receive in on-the-job training. Its approach is more theoretical, providing the apprentices with an academic understanding of the skills they are developing." (Petition, pp. 27-28).

In short, the undisputed facts simply do not fit the picture of activity which is "pursued necessarily and primarily for the benefit of the employer and his business".

That there would have been no recovery in this case even under the Fair Labor Standards Act is further indicated by *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947), in which this Court held that participants in "a course of practical training to prospective yard brake-

men" given by the respondent railroad were not "employed" and therefore not covered by the Fair Labor Standards Act. This Court relied on the Act's policy of encouraging apprenticeship (29 U.S.C. § 214), a policy plainly applicable here. The result sought by the apprentices would have quite the opposite effect. Employers faced with the unexpected burden of paying for classroom and study time would certainly curtail, if not terminate, apprenticeship programs, and the purpose of Congress would be thwarted.

As the Court of Appeals observed, *Portland Terminal* made clear that to the extent trainees are receiving instruction, as distinct from working, they are not entitled to compensation. Their legal position is not improved by the fact that GE also employs the apprentices for production work, and pays them for that work at rates well above the minimum wage.

This aspect of the decision below is further supported by the opinion of the Wage-Hour Administrator that "the classroom instruction and attendant homework" in the Lynn-GE apprenticeship programs "is primarily of benefit to the employee . . . ." (Petition, p. 60), which opinion is entitled to great weight pursuant to numerous decisions of this Court (p. 11, supra).

B. *The Classroom Time Is Not Compensable under The Portal-to-Portal Act.*

The principal purpose of the Portal-to-Portal Act, 29 U.S.C. § 254(a), was, of course, to limit, rather than to enlarge, the coverage of "hours worked" under the Fair Labor Standards Act. *See* H.R. Rep. No. 71, 1947 U.S. Code Cong. Serv. 1020 (Feb. 25, 1947).

The essence of the Act insofar as it is applicable here is that there not be compensation for "activities which are preliminary or postliminary" to "the principal activity

or activities which such employee is employed to perform", "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." (29 U.S.C. § 254(a); Petition, p. 49).

The undisputed facts on the record before the Court of Appeals establish beyond question that the related studies of the Apprentices were not an "integral and indispensable part" of their "principal activities," and thus are not compensable under the doctrine of *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956). The Richter affidavit (item 9) covers every course in every program involved here, and demonstrates as to each that the apprentices can and regularly do perform their shop work assignments without having had any related instruction; that most journeymen in the trades practiced by the apprentices (who, *ex hypothesi*, can and do perform the most difficult of the tasks assigned to the apprentices) have not had any academic instruction equivalent to the related studies courses involved here; that the related studies could be dispensed with entirely; that requisite instruction is given on-the-job; and that the training function of the apprenticeship program could be accomplished satisfactorily by a program involving solely on-the-job training of the kind afforded apprentices now (item 9, pp. 39-40). The affidavit abundantly shows that the on-the-job training, which occupies eight hours a day, forty days a week, and over 90% of the apprentices' time, is their principal activity, and that their classroom instruction is dispensable.

Petitioner's contrary argument, based solely on what GE required of them, overlooks the obvious distinction between what is required of an apprentice if he wants to keep his job and what is absolutely necessary in order to

enable him to perform his work. The latter is clearly the critical question under the teaching of *Steiner* and *King Packing Co.* In *Steiner*, the Court held that employees of a storage battery manufacturer were entitled to compensation for time spent in showering and changing clothes, not because their employer required it, but because the peculiar health hazards of their work made it impossible to perform that work without showering and changing. Similarly, in *King Packing Co.*, the Court held that sharpening their knives was an "integral and indispensable part" of the primary work of knifemen in a meat packing plant because without sharpening their knives they could not perform that work. The critical distinction is that in *Steiner* and *King Packing* the employees could not perform their production work without engaging in the disputed activities, whereas here, it is undisputed that the apprentices can perform their productive work entirely without related studies. It follows under the principles of *Steiner* and *King Packing* that the apprentices' related studies are not integral and indispensable to their productive work, and hence, the time devoted thereto is noncompensable under Section 4 of the Portal-to-Portal Act.

Moreover, the factual analysis of the Richter affidavit is abundantly supported by the regulations of the Wage-House Administrator, which confirm that classroom instruction is "supplemental" to the principal activity of "work experience." Section 521.4 explicitly refers to "related instruction to supplement the work experience" (29 C.F.R. § 521.4); Section 785.32 refers to it as "related supplemental instruction" and "related supplemental training" (29 C.F.R. § 785.32), and section 521.3(i) indicates that "related instruction" must be provided "if available", and may be provided in the classroom, as here, or "through correspondence courses; or other forms of self study" (29 C.F.R. § 521.3(i)).

Other examples of activities integral and indispensable to productive work cited in a Senate colloquy which appears as an appendix to the Supreme Court's opinion in the *Steiner* case (350 U.S. at 256-259) confirm that the apprentices' related studies are not principal activity that Congress intended to be compensable. Senator Cooper there refers to preparatory activities which:

> "were so closely related to his *productive activity* that the employer must compensate the employee for it." (Emphasis added.) (350 U.S. at 256);

he approves of the principle that:

> "any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of *the rest of his day's work.*" (Emphasis added.) (350 U.S. at 257);

and he indicates that changing clothes is compensable only where "the employee could not perform his activity without putting on certain clothes." (350 U.S. at 258). The kinds of activities indicated by Senator Cooper to be "integral and indispensable" to productive work, such as oiling machinery, preparing tools and moving cloth, are so different from the activities in question in this case as to confirm, under the canon of *ejusdem generis*, that the apprentices' related studies are not "indispensable" to their productive work in the sense of that term as used in the legislative history.

Furthermore, as the Report of the Senate Judiciary Committee states, the Portal-to-Portal Act

> ". . . provides that activities performed outside of the workday, are not to be compensable except by contract or by a practice or custom not inconsistent therewith.

> The rule laid down is that activities which take place either prior to the time at the beginning of his workday, when such employee commences, or subsequent to the time at the end of his workday, when such employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith." (S. Rept. No. 48, 80th Cong., 1st Sess. 47).

The basic thrust of the legislative history is that the compensability of nonproductive activities performed outside of normal working hours which are not indispensable to productive activities is dependent upon a "contract" or "custom or practice", none of which is present here.

C. The Requirements Of Section 785.32 Were Met.

The next supposed error of the Court of Appeals resides in its conclusion that there was "employee-employer cooperation" (Petition, pp. 15-24).

As previously noted, § 785.32 "bolstered", but was not essential to, the decision below; and in any event, all that § 785.32 requires is employment under an apprenticeship program "which substantially meets the fundamental standards" for apprenticeship of the Bureau of Apprenticeship and Training, which would be the case even if the Court of Appeals erred in its conclusion that the requirement of "employee-employer cooperation" was met. That requirement is one of 12 requirements of the Bureau of Apprenticeship and Training for apprenticeship programs referred to in 29 C.F.R. § 785.32 (item 9, pp. 3-20; item 12). That the other 11 were met is undisputed, and there was extensive cooperation (item 9, pp. 15-19). As the Court of Appeals stated (Petition, p. 32):

> "Appellants make no attempt to argue that G.E. does not comply with 11 of the 12 standards set forth in publications of the Bureau of Apprenticeship and Training. They claim there is an issue of fact as to whether there is compliance with the requirement of employee-employer cooperation on the basis of an affidavit which indicates that the union would like to have more influence over some aspects of the apprenticeship program. To the extent that, if proved, a latent union-management dispute over a part of the program would cast doubt on the existence of complete employee-employer cooperation, we find that doubt is not sufficient to show that a *substantial* compliance has not been obtained." (Emphasis in original.)

In any event, the decision of the court below that the twelfth requirement of "employee-employer cooperation" was met is abundantly supported by the record (item 9, pp. 15-19).

The Petition (pp. 15-24) misconstrues the Bureau of Apprenticeship and Training's standard of "employee-employer cooperation," which according to the Petition (p. 16) "requires the collective bargaining agent's participation *and approval* in the formation and the administration of the Apprenticeship program." (Emphasis supplied.)

The Court of Appeals' opinion abundantly demonstrates that petitioners' contention "is bootstrapped from their confusion . . . over two sets of standards", and also that "the fundamental standard speaks of cooperation, not agreement, and with employees, not bargaining units" (Petition, pp. 33-34, notes 5 and 6). The Bureau has repeatedly held apprentice programs in compliance with its standards without any indication of union approval or participation (item 9, pp. 17-18). Indeed, the Bureau has

informally and repeatedly approved the very apprentice programs in question here, after full disclosure (item 9, pp. 34-37). The Bureau pamphlets (items 24(a), (b)) from which the Petition (pp. 18-19) quotes, do not controvert this. They simply describe varieties of union participation which the Bureau thinks desirable when accepted voluntarily, without the slightest indication that such participation is required by the Bureau's fundamental standards.

The incredible consequences of the Petition's approach are vividly shown by the facts in this case. GE has instituted an elaborate discussion and bargaining program with its apprentices; they benefit, with other GE employees, from an extensive collective bargaining agreement, and are also protected by an informal "tenure" arrangement (item 9, pp. 15-16). In challenging this extensive showing of employee-employer cooperation, it is shown that the union has made various protests concerning the apprentices (item 10, pp. 9-12). The recurring subject of these protests was that apprentices were given work normally performed by "regular employees" and that apprentices were retained when regular employees received layoff notices (item 10, pp. 10-11). In other words, the union Business Agent's own affidavit (item 10) shows that the union has consistently favored the interests of its other members over those of the apprentices.[6] Under the circumstances, the Petition's claim (pp. 16-20) that there can be no "employee-employer cooperation" unless the union participates in and approves the formation and administration of apprenticeship programs would set the goat to guard the cabbage patch.

Moreover, even if a standard of "employee-employer

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[6] The incidents relied on also concern almost entirely the period between 1962 and 1964. Since this action was started in 1967 (item 1) and a two-year statute of limitations applies, 29 U.S.C. § 255(a), the incidents do not bear on the existence of employee-employer cooperation during any relevant period.

cooperation" could be read to imply a requirement of union "participation and approval", the union in this case has waived any such requirement. The applicable collective bargaining agreement provides that, "Subject only to any limitations stated in this Agreement . . . the Company retains the exclusive right to manage its business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force, and to conduct its operations in a safe and efficient manner." (Item 9, pp. 16-17). There are no such limitations applicable to apprenticeship except the general provisions as to wages, hours and other terms and conditions of employment. Traditionally, GE has not shared the management of its apprentice programs with unions, and the above language was retained in the collective bargaining agreement after the union made a demand during negotiations, which GE rejected, that joint administration be instituted (item 9, p. 17). It is not claimed (to anticipate an argument made in the lower courts) that the clause quoted above waived the union's right to discuss and bargain about apprenticeship at individual GE plants; such bargaining has in fact occurred (item 9, p. 15). But the clause does waive any claim by the union to participate, as of right and with a veto, in the institution and administration of apprenticeship programs. It therefore bars the Petition's claim (pp. 16-20).

D. *Petitioners' Remaining Arguments Are Specious.*

Finally, the hodge-podge of arguments concluding the Petition (pp. 20-24) is as lacking in merit as what precedes it.

The Petition (p. 20) first argues erroneously that a material issue of fact remains in the case. No fact on which there is *any* conflicting evidence is specified, and none

exists. What is apparently meant is that the facts as shown do not constitute "employee-employer cooperation". But this is an issue of law such as appellate courts frequently decide. E.g., *Wyman* v. *James*, 39 U.S. Law Week 4085 (1971) (reasonableness of search decided on affidavits); *Graham* v. *John Deere Co.*, 383 U.S. 1, 17-37 (1966) (obviousness of invention); *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956) (whether activity was integral and indispensable to principal activities under Portal-to-Portal Act).

The Petition then (pp. 20-22) urges, with equal incorrectness that it was impossible for GE's apprentice programs to meet 29 C.F.R. § 785.32 because they have not been registered and approved by the Bureau of Apprenticeship and Training or a state apprenticeship agency. No such requirement appears in § 785.32 itself. The Petition relies on language in an opinion letter which is dictum, and which in any case deals with what evidence of compliance with § 785.32 will be acceptable to the Wage-Hour Administrator. This was not meant to and cannot bind the courts, which have their own fact-finding apparatus available to test compliance. More basically, GE's programs *have* been approved by the agencies in question; several times by the Bureau of Apprenticeship and Training (informally), and once (after this action started) by the Division of Apprentice Training, Massachusetts Department of Labor and Industries (item 9, pp. 32-38).

Lastly, the Petition (pp. 23-24) attacks the validity of the Wage-Hour Administrator's Opinion Letter 996, which passed on precisely the apprentice programs involved in this case and held that GE has not violated the Fair Labor Standards Act. The Petition's claim that this opinion letter is inconsistent with a 1964 opinion letter was refuted by the Court of Appeals (Petition, p. 26) when it denied rehearing on this very issue.

"Apart from the fact that our reliance on this Letter was secondary and cumulative, we are persuaded that our reliance was correct. Opinion Letter 996, ruling that the G.E. program was a 'special situation', relates to 29 C.F.R. § 785.31, which has to do with 'special situations' when training programs are not considered as working time even though all of the criteria of section 29 C.F.R. § 785.27 are not met. The allegedly earlier conflicting Opinion Letter, 272, is addressed to the latter regulation."

The *relevant* rulings strongly support the Administrator's conclusion in this case. Opinion Letter of August 4, 1965, 6A BNA Lab. Rel. Rptr., WHM 93:808; Opinion Letter No. 431, 1961-1966 CCH Lab. Law Rptr., Wages-Hours Admin. Rulings 40,592 (1966); see Opinion Letter No. 465, Id. 40,632 (1966). It would therefore have been proper, not merely to bestow "secondary and cumulative" reliance on the Administrator's letter, as the Court of Appeals did, but to give it great weight. See cases cited *supra*, p. 11.

Conclusion

For these reasons, certiorari should be denied.

Respectfully submitted,

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